(1)

90-1017

Case No. _____

Supreme Court, U.S.
FILED
DEC 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative association,
Petitioner,

v.

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BOYD H. RATCHYE
DOHERTY, RUMBLE & BUTLER, P.A.
2800 Minn. World Trade Center
St. Paul, MN 55101
Phone: (612) 291-9333
Attorneys for Petitioner

JAY FIEDLER
LETNES, MARSHALL, FIEDLER & CLAPP, LTD.
401 DeMers Avenue
Suite 202
Grand Forks, ND 58206
Phone: (701) 772-3407
Attorneys for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

This case presents a question of fundamental fairness relating to the power of a federal appellate court to affirm a summary judgment entered by a district court on a theory that was not raised by the parties or considered by the district court.

Petitioner Basin Electric Power Cooperative (hereinafter "Basin Electric") purchased a Non-Profit Organization Liability Insurance Policy (hereinafter "the Policy") from Crum & Forster Managers Corporation d/b/a International Insurance Company (hereinafter "Crum & Forster") on June 1, 1984. (*See* App. F).[1] In September 1985, Basin Electric notified Crum & Forster of a claim on the Policy in the amount of $6.4 million. Crum & Forster thereafter commenced an action against Basin Electric in the United States District Court for the District of North Dakota conceding coverage, but claiming that several express exclusions under the Policy relieved it of any liability for Basin Electric's loss.

In April 1989, Crum & Forster moved the District Court for summary judgment based solely upon Exclusion No. 1 under the Policy. To both parties' surprise, the District Court rejected all grounds for summary judgment advanced by Crum & Forster, stated that it believed a better and different issue was whether the Policy afforded coverage in the first instance and then proceeded to address that issue "upon its own motion." (App. D at D-2). Without providing the parties with any form of notice or opportunity to present evidence or otherwise respond, the District Court granted summary judgment

[1] Citations to the Appendix appears as "App. ___."

in favor of Crum & Forster holding that the Policy did not provide coverage for Basin Electric's loss.

Basin Electric filed a timely appeal to the United States Court of Appeals for the Eighth Circuit on May 17, 1989. On appeal, Basin Electric argued, *inter alia*, that the District Court's grant of summary judgment on the issue of coverage, without providing the parties with any notice or opportunity to present evidence or otherwise respond, was prohibited by Rule 56 of the Federal Rules of Civil Procedure and numerous Eighth Circuit decisions. In its Opinion filed on August 15, 1990, the Eighth Circuit failed to address the propriety of the District Court's *sua sponte* award of summary judgment against Basin Electric in any manner. Instead, the Eighth Circuit rejected the District Court's analysis and held that the Policy did not provide coverage to Basin Electric for a reason entirely different from the reason advanced by the District Court. (*See* App. A at A-9-12). Much to Basin Electric's chagrin, the reason advanced by the Eighth Circuit was also a reason that was neither briefed, argued or otherwise raised by the parties. As a result, Basin Electric has yet to have a meaningful opportunity to present evidence or otherwise respond to any issue relating to coverage under the Policy.

Based upon the foregoing, Basin Electric presents the following question for review by the Court:

Whether the Eighth Circuit erred by affirming the summary judgment entered against Basin Electric by the District Court on a theory that was not raised by the parties or the District Court without providing Basin Electric with a fair opportunity to present evidence and legal argument relating to that theory?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Opinions Below and Jurisdiction	1
Statement of the Case	2
A. The Policy	2
B. The Loss	2
C. The Commencement of This Action	4
D. The Summary Judgment Motions	4
E. The Appeal	6
Reasons For Granting Writ	8
A. Numerous Decisions Of This Court And Other Courts Of Appeal Mandate Reversing The Eighth Circuit's Failure To Provide Basin Electric With A Reasonable Opportunity To Present Evidence And Legal Argument Relating To The Issue Of Coverage Under The Policy.	8
B. Basin Electric Has Been Denied The Opportunity To Try Genuine Issues Of Material Fact; Given A Meaningful Opportunity To Present Evidence, Basin Electric Will Establish That The Policy Provides Coverage For Its Loss.	10
1. "Negligent" conduct is just one of many bases for coverage under the Policy.	11

Page

2. The course of dealing between the parties establishes that the Policy provides coverage for Basin Electric's loss. 11

3. Crum & Forster waived any issue relating to coverage under the Policy. 13

4. Current case law interpreting the same Policy at issue in this case establishes coverage for Basin Electric's loss. 14

5. Crum & Forster's responses to Basin Electric's outstanding discovery requests are likely to produce probative evidence relating to the scope of coverage under the Policy. 14

C. This Case Presents Important Issues Relating To The Administration Of Justice Under Rule 56 Of The Federal Rules Of Civil Procedure Which Should Be Resolved By The Court. 15

Conclusion 17

Statement Required By Rule 28.1 17

Appendix ..... App. A-1

TABLE OF AUTHORITIES

Cases: Page

Basin Electric Power Cooperative v. Midwest Processing Company, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986) 3

British Airways Board v. Port Authority of New York, 558 F.2d 75 (2d Cir. 1977) 8

Church of Scientology of California v. Cazares, 638 F.2d 1272 (5th Cir. 1981) 15

Fountain v. Filson, 336 U.S. 681 (1949) 8

Heirs of Fruge v. Blood Services, 566 F.2d 841 (5th Cir. 1975) 9

Hormel v. Helvering, 312 U.S. 552 (1940) 8, 10, 14, 15, 16, 17

International Insurance Company v. Johns, 874 F.2d 1447 (11th Cir. 1989) 14

International Medical Prosthetics Research Associates v. Gore Enterprise Holdings, Inc., 787 F.2d 572 (Fed. Cir. 1986) 15

Midgette v. Basin Electric Power Cooperative, a North Dakota District Court case 12

Proctor v. State Farm Mutual Automobile Insurance Company, 675 F.2d 308 (D.C. Cir. 1982) 9

Reeder v. Kansas City Board of Police Commissioners, 733 F.2d 543 (8th Cir. 1984) 15

Rich v. United States Lines, Inc., 596 F.2d 541 (3d Cir. 1979) 9

Page

Sadler v. Basin Electric Power Cooperative, 409 N.W.2d 87 (N.D. 1987) 12

Singleton v. Wulff, 428 U.S. 106 (1975) 8

Sjoberg v. State Farm Auto Insurance Association of Des Moines, Iowa, 78 N.D. 179, 48 N.W.2d 452 (N.D. 1951) 13

Wilson v. St. Louis-San Francisco Railway Company, 673 F.2d 1152 (10th Cir. 1982) 15

Statutes and Rules:

11 U.S.C. § 303 ..... 3, 11

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 4

Fed.R.Civ.P. 56 ..... ii, 15

IN THE

Supreme Court of the United States

October Term, 1990

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative association,
Petitioner,

v.

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW AND JURISDICTION

The District Court entered summary judgment against Basin Electric pursuant to a Memorandum and Order filed on August 22, 1989. (*See* App. D). The Eighth Circuit affirmed the summary judgment entered against Basin Electric by the District Court in an Opinion filed on August 15, 1990. (*See* App. A). The Eighth Circuit denied Basin Electric's Petition for Rehearing With Suggestion for Rehearing En Banc in an Order filed on September 25, 1990. (*See* App. B). The jurisdiction of this Court is invoked under the authority of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Policy

The relevant language of the Policy provides that Crum & Forster will pay for "all Loss which [Basin Electric or Basin Electric's officers or directors] shall be legally obligated to pay for any civil claim or claims first made against them because of a Wrongful Act. . . ." (App. F at F-1). The term "Wrongful Act" is broadly defined by the Policy as "any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of [Basin Electric's officers or directors] while acting in their capacity as an authorized representative of [Basin Electric]. . . ." (App. F at F-2).

B. The Loss

In 1982, Basin Electric entered into a series of contracts with Midwest Processing Company (hereinafter "Midwest") pursuant to which Basin Electric spent $5.8 million to finance the construction of a plant to process sunflower seeds. Basin Electric's investment was to be repaid over the life of the contracts. In order to secure Basin Electric's investment, Midwest obtained a three-year letter of credit in the amount of $5 million from Continental Illinois National Bank and Trust Company of Chicago (hereinafter "Continental"). The letter of credit contained a provision which entitled Basin Electric to obtain the funds in the event that a petition under the United States Bankruptcy Code was filed by or against Midwest.

In February 1984, Basin Electric discovered that Midwest had failed to make a $2.8 million interest payment on its out-

standing long-term debt. After providing Midwest with a thirty-day cure period, Basin Electric declared Midwest's entire debt immediately due and owing. Midwest, however, failed to pay the outstanding balance of $5.3 million. Basin Electric thereafter discovered that Midwest had sold all of its raw inventory, laid off its employees, closed down its business and refused to renew the letter of credit securing its $5.3 million obligation to Basin Electric. Based upon that information, Basin Electric filed an involuntary petition against Midwest on March 29, 1984, under Chapter 11 of the United States Bankruptcy Code.

Midwest challenged the involuntary petition by claiming that since it had more than twelve creditors, at least two other creditors were required to join in the petition. *See* 11 U.S.C. § 303. The United States Bankruptcy Court for the District of North Dakota upheld the petition, permitted the joinder of two additional creditors and found that Midwest was incapable of satisfying its obligations as they became due. Pursuant to the agreement between the parties, Continental then released the proceeds of the letter of credit to Basin Electric.

Midwest thereafter appealed the Bankruptcy Court's decision to the District Court. The District Court held that Basin Electric had filed the involuntary petition in bad faith under 11 U.S.C. § 303 since Basin Electric knew that Midwest had more than twelve creditors at the time of filing and dismissed the involuntary petition. Basin Electric appealed the District Court's dismissal and the Eighth Circuit affirmed. *See Basin Electric Power Cooperative v. Midwest Processing Company*, 769 F.2d 483 (8th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986).

Based upon the Eighth Circuit's affirmance of the District Court's dismissal of the involuntary petition, Continental commenced an action against Basin Electric to recover the money that it had paid under the letter of credit. That action was ultimately settled by Basin Electric for $6,879,000.

C. The Commencement of This Action

After settling with Continental, Basin Electric made a timely demand upon Crum & Forster for reimbursement of the settlement amount, legal fees and costs under the Policy. Crum & Forster conceded coverage, but stated that it believed several exclusions under the Policy required the denial of Basin Electric's claim. Crum & Forster then commenced this action. Federal jurisdiction was based upon the complete diversity of citizenship between the parties and the fact that the amount in controversy exceeded the jurisdictional amount, exclusive of costs and interest. *See* 28 U.S.C. § 1332. In its Complaint, Crum & Forster conceded coverage, but sought a declaration that Exclusion Nos. 1, 2 and 3 of the Policy relieved it of any obligation to pay for Basin Electric's loss. Crum & Forster consistently maintained that position throughout the course of the litigation.

D. The Summary Judgment Motions

Crum & Forster brought its first motion for summary judgment in April 1988 based upon Exclusion Nos. 2 and 3 under the Policy. Crum & Forster's motion was denied by the District Court on August 22, 1988. In its Order, the District Court concluded by stating that it believed that "[a] stronger argument for summary judgment can be based upon the first exclusion [under the Policy]." (App. E at E-6). The Dis-

trict Court reserved a decision on that issue, however, for another day.

In April 1989, Crum & Forster took the advice of the District Court and renewed its motion for summary judgment based solely upon Exclusion No. 1. Nowhere in its motion papers did Crum & Forster argue that Basin Electric's loss was outside the scope of coverage of the Policy. Rather, Crum & Forster took the same position that it had consistently taken prior to commencing the action and throughout the course of the litigation, i.e., that the Policy provided coverage for Basin Electric's loss, but that one or more of the exclusions relieved Crum & Forster of any liability. The District Court's Order clearly delineates the positions taken by the parties in connection with Crum & Forster's renewed summary judgment motion:

> The basic arguments before the court can be summarized quite easily. It is Basin's position that the settlement agreement entered into by Basin with Midwest Processing and Continental Illinois Bank of Chicago to settle prior litigation between them; [sic] arising out of the filing of the involuntary bankruptcy petition in order to draw on the letter of credit, qualifies as a compensable loss under the insurance policy entered into between Basin and Crum & Forster. Crum & Forster, on the other hand, for the purpose of this motion, adopts the position that the payment made under the settlement agreement is a compensable loss as contemplated by the policy, but argues that one or more policy exclusions apply to relieve them [sic] of liability. *Counsel for* [*Basin*] *is correct in noting that under the pending motion, the only issue to be resolved by the court is whether any of the exclusions apply to relieve Crum & Forster of liability.*

(App. D at D-2) (emphasis added).

Despite its earlier invitation to Crum & Forster, the District Court was dissatisfied with the issues raised by the parties:

> The Court, however, does not agree with the parties [sic] characterization of the issues before it. . . . The court believes that the fundamental question of coverage under the policy still exists. Specifically, it must be determined whether the payment made by Basin to settle the Midwest and Continental litigation, comprises a compensable loss under the terms of the insurance policy. *Therefore, the court will address this issue upon its own motion.*

(App. D at D-2) (emphasis added). The District Court proceeded to hold that the Policy did not afford coverage for Basin Electric's loss. Although it is not entirely clear from its Order, the District Court held that Basin Electric could not recover from Crum & Forster under the Policy because, the District Court found, Basin Electric could not recover from Continental under the letter of credit. (*See* App. D at D-5). Neither party was given any notice or opportunity to present evidence or otherwise respond to the coverage issue raised by the District Court.

E. The Appeal

Basin Electric timely filed an appeal to the Eighth Circuit on May 17, 1989. In its Brief, Basin Electric argued, *inter alia*, that the District Court erred in granting summary judgment without providing the parties with any notice or opportunity to present evidence or otherwise respond. The Eighth Circuit understood that this was the key issue on appeal because it began its discussion by noting: "Basin contends on appeal that the district court erred in entering *sua sponte* summary judg-

ment in favor of Crum & Forster on an issue that had not been briefed, argued, or raised by Crum & Forster in its motion for summary judgment." (App. A at A-6). The Eighth Circuit nevertheless failed to address the propriety of the District Court's *sua sponte* ruling in any manner. Instead, the Eighth Circuit rejected the District Court's reasoning and held that the Policy did not provide coverage for Basin Electric's loss for a reason entirely different from the reasons advanced by the District Court or Crum & Forster on appeal. Based upon findings from other cases indicating that Basin Electric knew that Midwest had more than twelve creditors when it filed the involuntary petition, the Eighth Circuit held that there was no coverage under the Policy because "Basin's officers and directors did not act negligently" in filing that petition. (App. A at A-9). As in the District Court, Basin Electric was deprived of any meaningful opportunity to present evidence or otherwise respond to the coverage issue raised by the Eighth Circuit.

REASONS FOR GRANTING WRIT

A. Numerous Decisions Of This Court And Other Courts Of Appeal Mandate Reversing The Eighth Circuit's Failure To Provide Basin Electric With A Reasonable Opportunity To Present Evidence And Legal Argument Relating To The Issue Of Coverage Under The Policy.

This Court has long held that a federal appellate court should not consider issues not passed upon below where the parties did not have a reasonable opportunity to present evidence and legal argument relevant to those issues to the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1975); *Fountain v. Filson*, 336 U.S. 681, 683 (1949); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940). As explained by the Court in *Hormel*:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel, 312 U.S. at 556. The Court's reasoning in *Hormel* and subsequent cases has been almost uniformly adopted and applied by federal appellate courts. *See, e.g., British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (2d

Cir. 1977) ("We are particularly reluctant to affirm the District Court's grant of summary judgment on another ground—especially one not advanced by the parties—where the effect is to deprive the appellant from disputing facts material to that claim"); *Rich v. United States Lines, Inc.*, 596 F.2d 541, 551 (3d Cir. 1979) ("It seems generally established that an appeals court may affirm a decision granting summary judgment or judgment notwithstanding the verdict based on a theory different from that of the district court so long as the parties have had the opportunity to present all the available evidence"); *Heirs of Fruge v. Blood Services*, 506 F.2d 841, 844 n. 2 (5th Cir. 1975) (a court of appeal may affirm a summary judgment on a ground not advanced by the parties or the district court if "the parties had a full and fair opportunity to develop facts relevant to the decision"); *Proctor v. State Farm Mutual Automobile Insurance Company*, 675 F.2d 308, 325-26 (D.C. Cir.) ("an appellate court may affirm a grant of summary judgment on a ground not relied upon by the lower court, provided 'the opposing party [has had] a fair 'opportunity to dispute the facts material' to the new theory"), *cert. denied*, 459 U.S. 839 (1982).

The record is clear that Basin Electric was not provided with any opportunity to introduce any evidence to the District Court relating to any issue of coverage under the Policy. Basin Electric was also deprived of any meaningful opportunity to present such evidence to the Eighth Circuit. Although Basin Electric filed a motion to supplement the record on appeal with certain evidence relating to the issue of coverage, the Eighth Circuit did not pass upon that motion and completely ignored the new evidence in reaching its decision. (*See* App. C; App. A at A-6-12). Accordingly, Basin Electric was clearly deprived of the opportunity to present evidence and respond

required by the Court's decisions in *Hormel* and subsequent cases.

Crum & Forster may argue that Basin Electric was not treated unfairly because it included several arguments relating to coverage in its Brief to the Eighth Circuit. This argument misses the point, however, for several reasons. First, the coverage arguments contained in Basin Electric's Brief were based, for the most part, upon evidence that was not part of the record and which the Eighth Circuit declined to consider. Second, the arguments were addressed to the coverage issues raised by the District Court, not the new coverage issues raised by the Eighth Circuit. Finally, like Basin Electric's motion to supplement the record, the Eighth Circuit completely ignored the arguments relating to coverage contained in Basin Electric's Brief. (*See* App. A at A-6-12). In any event, the ability of Basin Electric to make naked legal arguments at the appellate level is not the due process envisioned by the Court's decisions in *Hormel* and subsequent cases. Rather, those cases make it perfectly clear that Basin Electric should have been given an opportunity to present all of its evidence and legal arguments relating to coverage issues under the Policy to the District Court. As previously stated, Basin Electric was deprived of any such opportunity.

B. Basin Electric Has Been Denied The Opportunity To Try Genuine Issues Of Material Fact; Given A Meaningful Opportunity To Present Evidence, Basin Electric Will Establish That The Policy Provides Coverage For Its Loss.

Given a meaningful opportunity to present evidence to the District Court, Basin Electric will establish that the Policy

provides coverage for its loss for a variety of reasons, including the following:

1. **"Negligent" conduct is just one of many bases for coverage under the Policy.**

As previously discussed, the Eighth Circuit held that the Policy did not provide coverage for Basin Electric's loss because it found that Basin Electric was not negligent in filing the involuntary bankruptcy petition against Midwest. Negligence, however, is not the only basis for coverage under the Policy. The Policy also provides coverage for all loss caused by "errors," "acts and omissions" and "breaches of duty." Given the opportunity to present evidence on this issue, Basin Electric is confident that it will be able to show that the decision by its officers and directors to file the involuntary bankruptcy petition against Midwest in violation of 11 U.S.C. § 303 constituted an "error," "act or omission" and/or a "breach of duty" within the meaning of the Policy. At the very least, these are genuine issues of material fact that Basin Electric should be entitled to present to the trier of fact.

2. **The course of dealing between the parties establishes that the Policy provides coverage for Basin Electric's loss.**

Given the opportunity, Basin Electric will introduce evidence establishing a course of dealing between Basin Electric and Crum & Forster which establishes that the Policy provides coverage for Basin Electric's loss. More specifically, Basin Electric will introduce evidence documenting other Basin Electric loss claims within the scope of the Policy which Crum & Forster agreed to pay notwithstanding the fact that the

losses were the product of intentional as opposed to negligent conduct; notwithstanding the fact that the losses were caused by the exercise of sound business judgment by Basin Electric's officers and directors; and notwithstanding the fact that the claims were claims asserted directly against Basin Electric and not against Basin Electric's officers or directors. Two examples of such claims are the claims resulting from *Sadler v. Basin Electric Power Cooperative*, 409 N.W.2d 87 (N.D. 1987) and *Midgette v. Basin Electric Power Cooperative*, a North Dakota District Court case. The administration of the Policy and the resolution of the claims in the *Midgette* and *Sadler* cases is completely contrary to the scope of coverage suggested by the District Court and the Eighth Circuit. Basin Electric and its counsel simply cannot advise the Court more candidly and more accurately than with that flat assertion.

The *Midgette* and *Sadler* cases arose out of restructuring decisions made by Basin Electric in 1985. As a result of those decisions, several positions at Basin Electric were eliminated. Midgette and Sadler were two employees whose positions were eliminated who commenced lawsuits against Basin Electric alleging wrongful discharge. Despite the fact that the losses created by those cases were the result of the exercise of sound business judgment by Basin Electric, Crum & Forster extended coverage under the Policy for both claims. The extension of coverage in the *Midgette* and *Sadler* cases flatly rebuts the reasoning advanced by both the Eighth Circuit and the District Court and establishes a clear course of dealing showing that the Policy provides coverage for precisely the type of loss at issue in this case.

3. Crum & Forster waived any issue relating to coverage under the Policy.

Under North Dakota law, an insurer can waive a right under an insurance policy through its conduct. *See Sjoberg v. State Farm Auto Insurance Association of Des Moines, Iowa*, 78 N.D. 179, 48 N.W.2d 452 (N.D. 1951). In *Sjoberg*, the North Dakota Supreme Court held that the insurance company could not avoid liability under a life insurance policy by virtue of a forfeiture clause which provided that coverage was contingent upon payment of the policy premium, which had not been paid at the time the insured died. Although the insured had failed to timely pay the premium, the Court found that the insurer's failure to object to the late payment constituted a waiver of its rights under the forfeiture clause. According to the Court, "[a] waiver results from any unequivocal act of the insurer alone indicating an intention to waive a right." *Id.* at 457.

Given an opportunity to present evidence on this issue, Basin Electric is confident that it will be able to establish that Crum & Forster waived any issue relating to coverage under the Policy. Indeed, it is Basin Electric's position that Crum & Forster waived any coverage issues when it elected to deny Basin Electric's claim on the basis of the exclusions rather than on the basis of a defense of "no coverage" and consistently maintained that position throughout the course of the proceedings before the District Court. At the very least, Crum & Forster's repeated and consistent admissions of coverage create a genuine issue of material fact as to the waiver of any coverage issues which must be resolved by the trier of fact.

4. Current case law interpreting the same Policy at issue in this case establishes coverage for Basin Electric's loss.

The United States Court of Appeals for the Eleventh Circuit recently construed a corporate liability policy issued by Crum & Forster which is virtually identical to the Policy issued to Basin Electric. In *International Insurance Company v. Johns*, 874 F.2d 1447 (11th Cir. 1989), the Court held that a settlement of a shareholder suit attacking "golden parachute payments" was a "loss" within the meaning of Crum & Forster's Policy. The *Johns* case is analogous to the instant case and provides clear and direct authority supporting coverage for Basin Electric's loss.

5. Crum & Forster's responses to Basin Electric's outstanding discovery requests are likely to produce probative evidence relating to the scope of coverage under the Policy.

Crum & Forster has failed to produce documents and materials requested by Basin Electric in early 1988 and ordered to be produced by the District Court on January 26, 1989. Basin Electric is confident that Crum & Forster has many files in which it has recognized the broad scope of coverage provided by its Policy. Basin Electric is entitled to review those documents and submit any probative evidence on the issue of coverage contained therein to the District Court.

The above list is not exhaustive; nor should it have to be for purposes of this Petition. Basin Electric should not be required to prove, based upon the extremely limited record before the Court, that the Policy provides coverage for its loss. Rather, under the Court's decisions in *Hormel* and sub-

sequent cases, all that Basin Electric should be required to show is that it was deprived of any meaningful opportunity to present evidence or otherwise respond to the coverage issues deemed dispositive by the Eighth Circuit. Basin Electric has clearly satisfied this burden of proof.

C. This Case Presents Important Issues Relating To The Administration Of Justice Under Rule 56 Of The Federal Rules of Civil Procedure Which Should Be Resolved By The Court.

This Petition should be granted because this case presents important issues relating to federal summary judgment procedure which should be resolved by the Court. As previously discussed, numerous federal appellate courts have taken the position based upon *Hormel* and subsequent cases that a court of appeal should not pass upon an issue that was not raised in the district court unless the parties were given an opportunity to present all evidence relevant to that issue. Some federal appellate courts, however, have taken the position that it is acceptable for a court of appeal to rule on an issue not raised below *as long as there does not appear to be a genuine issue of material fact under the proper legal analysis. See, e.g., Church of Scientology of California v. Cazares,* 638 F.2d 1272, 1281 (5th Cir. 1981); *Reeder v. Kansas City Board of Police Commissioners,* 733 F.2d 543, 548 (8th Cir. 1984); *Wilson v. St. Louis-San Francisco Railway Company,* 673 F.2d 1152, 1155 (10th Cir. 1982); *International Medical Prosthetics Research Associates v. Gore Enterprise Holdings, Inc.,* 787 F.2d 572, 573 n. 2 (Fed. Cir. 1986). The difference between these two applications of the general rule set forth in *Hormel* and subsequent cases is dramatized in cases involving appeals from summary judgments. This is because the record in a case involving an appeal from a summary judgment is generally

limited to evidence the parties believed was essential to the particular issues raised by the motion for summary judgment. The complete story is seldom available on appeal. As a result, an affirmance on an issue not raised by the parties or the district court often deprives the parties of a decision based upon all of the facts and creates the problem sought to be prevented by the Court in *Hormel* of "litigants [being] surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel*, 312 U.S. at 556.

The predicament prevented by the Court in *Hormel* is precisely the predicament faced by Basin Electric in this case. Based upon findings that were made in other cases involving Basin Electric's decision to file an involuntary petition against Midwest, the Eighth Circuit apparently thought that it had enough facts upon which to affirm on an alternative ground. As it turned out, the Eighth Circuit was dead wrong in making that assumption and deprived Basin Electric of any opportunity to present evidence establishing coverage under the Policy, particularly evidence relating to the course of dealing between the parties established by the *Midgette* and *Sadler* cases. This case presents an ideal opportunity for the Court to clarify its holdings in *Hormel* and subsequent cases with respect to summary judgments and to prevent other litigants from being similarly deprived of their day in court.

CONCLUSION

The record unequivocally establishes that Basin Electric was deprived of any meaningful opportunity to present evidence or otherwise respond to the coverage issues deemed dispositive by the Eighth Circuit. The failure of the Eighth Circuit to provide Basin Electric with such an opportunity flies in the face of the Court's decisions in *Hormel* and subsequent cases and numerous federal appellate court decisions. If the Court does not act in this case to clarify the power of federal appellate courts to affirm summary judgments on theories not raised below, litigants like Basin Electric will continue to be "surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Hormel*, 312 U.S. at 556. Accordingly, Basin Electric respectfully requests that its Petition be granted.
granted.

Respectfully submitted,

BOYD H. RATCHYE
DOHERTY, RUMBLE
& BUTLER, P.A.
2800 Minn. World Trade Center
30 East Seventh Street
St. Paul, MN 55101-4999
(612) 291-9333
Attorneys for Petitioner Basin Electric Power Cooperative

STATEMENT REQUIRED BY RULE 28.1

Basin Electric has no parent corporations, subsidiaries or affiliates other than a wholly-owned subsidiary.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5277

CRUM & FORSTER MANAGERS CORPORATION
OF NEW YORK, d/b/a INTERNATIONAL
INSURANCE COMPANY,

Appellee,

v.

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota Electric Cooperative Corporation,

Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
NORTH DAKOTA

Submitted: May 16, 1990
Filed: August 16, 1990

Before ARNOLD, Circuit Judge; HEANEY, Senior Circuit Judge; and FRIEDMAN,* Senior Circuit Judge.

HEANEY, Senior Circuit Judge.

At issue on this appeal is whether Basin Electric Power Cooperative (Basin) can recover in excess of 6.9 million dollars under a nonprofit organization liability insurance policy

* The Honorable Daniel M. Friedman, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

issued by Crum & Forster Managers Corporation of New York (Crum & Forster). The district court held that the policy did not provide coverage to Basin. We affirm.

The facts underlying Basin's claim against Crum & Forster were stated in an earlier opinion of this Court and need not be fully restated here. *See Basin Elec. Power Co-op v. Midwest Processing Co.*, 769 F.2d 483 (8th Cir. 1985). Suffice to say that Basin entered into a commercial contract with the Midwest Processing Company (Midwest) under which Basin invested in excess of five million dollars in facilities necessary for the processing of sunflower seed bulbs. Basin was to recoup this money from Midwest over a period of years. As sole security for this investment, Midwest procured a three-year, five million dollar letter of credit from the Continental Illinois National Bank and Trust Company of Chicago (Continental) in favor of Basin. The letter of credit, which was set to expire on March 31, 1984, contained a provision permitting Basin to draw on it upon the filing of a petition by or against Midwest under the Bankruptcy Code.

A few months before the expiration date, Basin became concerned with Midwest's financial condition.[1] The board of

[1] The bankruptcy court found that Midwest had operated at a substantial loss since 1982; that it had suffered a net loss of 7.7 million dollars in 1983; that its assets had declined by approximately four million dollars from 1982 to the end of fiscal year 1983; that Midwest's net loss from operations in the first seven months of fiscal year 1984 had exceeded seven million dollars; that the Midwest processing facility had been closed from the spring of 1983 until October of that year and had been shut down again in mid-February of 1984; that Midwest had laid off 52 employees in the spring of 1984; that while Midwest had been paying its bills, it had only been able to do so because its principal stockholders had injected nearly one million dollars into the business; that Midwest had long-term obligations of 45 million dollars and that it had failed to make an interest payment of 2.8 million dollars due on February 28, 1984 on these obligations.

directors and officers decided, on the advice of counsel, to file a petition placing Midwest into involuntary bankruptcy. They took this action to recover on the letter of credit.

No creditors joined Basin in filing the petition. Midwest objected to Basin's action. It contended that because it had more than twelve creditors, at least three creditors had to join in the petition. The bankruptcy court rejected Midwest's argument and gave Basin thirty days to secure additional creditors. Basin secured the two additional creditors within the allotted time period. The bankruptcy court, finding that the three-creditor requirement had been satisfied, refused to dismiss the involuntary bankruptcy proceeding and entered an order for relief.

Midwest appealed to the United States District Court for the District of North Dakota. That court reversed the bankruptcy court and dismissed the proceeding. It held that Basin had acted in bad faith in submitting the petition without including at least two other creditors when it knew that Midwest had more than twelve creditors. *Basin Elec. Power Co-op v. Midwest Processing Co.*, No. A4-84-148, slip op. at 12 (D.N.D. Dec. 14, 1984).

> The statutory three creditor requirement reflects the purpose of an involuntary bankruptcy proceeding as envisioned by Congress: to protect the interests and desires of the creditors as a whole. That reasoning has application to the facts of this case. Those creditors holding the largest claims against Midwest do not desire a bankruptcy proceeding, but were attempting instead to reach an out-of-court restructuring agreement before Basin filed the involuntary petition. Indeed, Basin's unsecured debt represents a small fraction of Midwest's total debt. Filing an involuntary petition may have been in the best interests

of Basin, but was not seen by Midwest's other creditors as being in their best interests.

Basin's claim against Midwest is the subject of a significant dispute between the parties both as to liability and as to amount. Accordingly, the Bankruptcy Court did not consider Basin's claim in determining whether Midwest was generally not paying its debts as they became due. (R.A. 33 at 21). That Midwest's debt to Basin cannot be considered as evidence of nonpayment of debts is further reason for strict adherence to the three creditor requirement.

Id. at 11-12. It further stated:

Having concluded that the Bankruptcy Court erred in not dismissing the involuntary petition for failure to meet the three creditor requirement and by reason of Basin's bad faith in filing the petition, it is not necessary that this Court address the final issue raised by Midwest: that the Bankruptcy Court erred in its finding that Midwest is generally not paying its debts as such debts become due.

Id. at 18. This court affirmed.

The three creditor requirement is designed to prevent use of involuntary bankruptcy proceedings by creditors as a means of harassing an honest debtor. If the three creditor requirement is to have any legal significance, it may not be knowingly circumvented with an eye to adding other creditors later on. The sole purpose of Basin Electric was to file a petition quickly before the letter of credit expired. The parties had a contract dispute regarding the letter of credit. Basin Electric was motivated by the desire to attain an advantageous position with regard to the letter of credit. The use of the petition by Basin Electric

> to effect [sic] a nonbankruptcy purpose is further evidence of bad faith.

Basin Electric Power Co-op v. Midwest Processing Co., 769 F.2d at 487 (citation omitted).

Meanwhile, Continental had paid Basin five million dollars pursuant to the letter of credit. When this court accepted Midwest's view that Basin had filed in bad faith, Continental commenced an action to recover that amount. Basin promptly settled with Continental, agreeing to refund the amount paid plus interest and costs.

Basin then demanded that its insurer, Crum & Forster, reimburse it in the sum of 6.4 million dollars for the loss caused it by the "wrongful act" of its officers and directors in filing the bankruptcy petition found to be done in bad faith by the district court and affirmed by this court. The insurer denied coverage and promptly commenced an action for a declaratory judgment seeking "a policy construction of 'no coverage' for the claim involved." *Crum & Forster v. Basin*, No. A1-87-175, slip op. at 1 (D.N.D. Apr. 18, 1989) [April 18 order]. Crum & Forster filed a motion for summary judgment. It was denied originally. *Crum & Forster v. Basin*, No. A1-87-175, slip op. at 8 (D.N.D. August 22, 1988) [August 22 order].[2] Crum & Forster subsequently renewed its motion. The district court granted summary judgment in favor of Crum & Forster on the grounds that the policy did not provide coverage. April 18 Order at 5.[3] It stated:

---

[2] The district court reasoned on August 22, 1988 that a genuine dispute regarding whether the officers' and directors' conduct fell within the scope of one of the policy exclusions existed. August 22 Order at 8. The court did not discuss the scope of coverage issue.

[3] Basin asserted additional claims for $500,000 which were unrelated to the bankruptcy claim and were agreed to in settlement discussions. The district court stated:

> After reviewing the policy, and the facts and circumstances giving rise to Basin's claim under it, it is inconceivable to the court that the policy provides coverage for the $5 million and accrued interest. Therefore, as a preliminary threshold, it will be the order of the court that the policy provides no coverage applicable to the return of property acquired by "wrongful act" by either the entity or the other insureds. If Basin cannot show an entitlement to the $5 million under a commercial contract, it certainly cannot obtain the same result under the insurance contract. Such a result is clearly unconscionable.

Id.

Basin contends on appeal that the district court erred in entering *sua sponte* summary judgment in favor of Crum & Forster on an issue that had not been briefed, argued, or raised by Crum & Forster in its motion for summary judgment and that the policy does provide coverage. Crum & Forster had instead asserted that Basin was not entitled to recover under the policy by virtue of certain policy exclusions.[4]

> The policy is clearly not intended to insure that Basin suffers no business reversals through errors in judgment made by officers and directors managing the new company.
>
> Under the facts of this case, no officer, director or employee was faced with any liability to any third party which was claimed to have arisen from any error or omission. No event occurred which could create personal liability of any officer, director or employee to either a third party or to Basin, the employer.

April 18 Order at 6. We agree with this analysis and would add that there are no allegations or supporting affidavits in the record to indicate that the settlement agreement with respect to the $500,000 was anything other than a good faith settlement between the parties based on the exercise of judgment by the officers and directors.

[4] Crum & Forster asserted that the officers' and directors' conduct fell into each of the following exclusions:

We look to the language of the policy to determine whether coverage extends to these facts as held to exist in various court decisions.

NON-PROFIT ORGANIZATION LIABILITY INSURANCE

THIS IS A CLAIMS MADE POLICY.

READ YOUR POLICY CAREFULLY.

IN CONSIDERATION of the payment of the premium and subject to all of the terms, conditions and exclusions of this Policy, the Company agrees with the Insureds under Coverage A and the Entity under Coverage B as follows:

INSURING AGREEMENTS

I. Coverages A and B

A. The Company will pay on behalf of the Insureds all Loss which the Insureds shall be legally obligated to pay for any civil claim or claims first made against them

---

The Company shall not be liable to make payment for Loss in connection with any claim made against the Insureds allegedly, based upon or arising out of one or more of the following:

1. An Insured gaining any personal profit or advantage to which they were not legally entitled;

2. The return by the Insureds of any remuneration paid in fact to them if payment of such remuneration shall be held by the courts to be in violation of law;

3. Brought about or contributed to by the dishonesty of the Insureds, however, notwithstanding the foregoing, the Insureds shall be protected under the terms of this policy as to any claim upon which suit is brought against them by reason of any alleged dishonesty on the part of the Insureds, unless a judgment or other final adjudication thereof adverse to the Insureds shall establish that acts of active and deliberate dishonesty committed by the Insureds with actual dishonest purpose and intent were material to the cause of action so adjudicated;

. . .

7. The willful violation of statute or ordinance committed by or with the knowledge or consent of an insured.

because of a Wrongful Act, provided that the claim is first made during the policy period and written notice of said claim is received by the Company during the policy period.

B. The Company will reimburse the Entity for all Loss for which the Entity shall be required by law to indemnify individual Insureds for any civil claim or claims first made against them because of a Wrongful Act, provided that the claim is first made during the policy period and written notice of said claim is received by the Company during the policy period.

. . .

III. Definitions

A. "Insureds" shall mean the Entity and any Individual who was, now is, or shall be a Director, Officer, Trustee, Employee, Volunteer or Staff member of the Entity and shall include any Executive, Board Member and Committee Member whether salaried or not.

B. "Entity" shall mean only that non-profit Organization, Association or Corporation which is named in the Declarations and is legally constituted at the inception date of this policy. . . .

D. The term "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of the individual Insureds while acting in their capacity as an authorized representative of the Entity, subject to the further terms, conditions and limitations of this policy.

E. "Loss" shall mean any amount which the Insureds are legally obligated to pay or which the Entity shall be required, or permitted by law to pay as indemnity to the

> Insureds, for any claim or claims made against them, for Wrongful Acts . . . .

On the basis of the coverage language, we cannot affirm the district court for the reason given by it. The fact that Basin could not recover from Continental is not cause in and of itself for holding that Basin cannot recover from its insurer. If Basin's officers were, in fact, negligent in filing the involuntary petition in bankruptcy and if Midwest was, in fact, insolvent in the bankruptcy sense at the time Basin filed the petition, then Basin would, absent special circumstances, be entitled to recover under the plain language of the insurance policy.

Basin would clearly be an "insured" under section III, paragraph A, and the officers, directors, and employees of Basin were "insureds" under the same provisions. If the officers and directors acted negligently in filing the bankruptcy petition by failing to join two additional creditors, that negligence would be a "wrongful act" within the meaning of section III, paragraph D. Moreover, Basin would have incurred a "loss" under section III, paragraph E because it was required to refund a payment made to it under the letter of credit issued by Continental, a payment resulting from the negligence of the officers, directors, and employees of Basin.

The difficulty here is that Basin's officers and directors did not act negligently. The district court instead held that Basin had not acted in good faith in filing the petition for the involuntary bankruptcy of Midwest for two reasons. The first, to which we have already alluded, is that the petition was not signed by three creditors. The second is that Basin was motivated by an improper reason to file the petition, that reason being its desire to draw on the letter of credit provided by Continental. This court affirmed the district court, specifically

relying on both reasons. Thus, we accept these decisions as the law of the case.[5] *See, e.g., Little Earth of United Tribes v.*

---

[5] Were we writing on a clean slate, we would be inclined to hold that Basin had a right to file the petition to place Midwest in bankruptcy. Only by taking this action could it protect its secured position. To be sure, the rights of the unsecured creditors would be affected by this action because Midwest made a two million dollar deposit with Continental Bank to partially protect Continental if it were required to pay on the letter of credit. The unsecured creditors would thus have had two million dollars less to distribute among themselves.

Of course, Basin would, as the bankruptcy court held, have had an obligation to prove that Midwest was not generally paying its debts, a fact found to be true by the bankruptcy court. The district court, however, did not reach this question because it held that Basin's subjective motives in filing the petition were controlling rather than whether Midwest was generally paying its bills as they came due.

As this court has noted, intervention as a petition in an involuntary bankruptcy proceeding is a right which the court must acknowledge. As long as the claims which the petitioners hold are not contingent as to liability and aggregate an unsecured sum of at least $5,000.00, the court will accept the petition for involuntary relief and address its merits. Although Midwest disputes the claim of Basin Electric, it does not dispute that Basin Electric asserts a claim in an amount which exceeds by more than $5,000.00 the value of its claimed security. Basin Electric has standing to be a petitioning creditor in this proceeding, notwithstanding that it is the holder of a disputed claim *See In re R.N. Salem Corp.*, 23 B.R. 452, 456 (Bankr. S.D. Ohio 1982) ("One need thus look no further than the statute itself for a determination that 'claim' for purposes of the Bankruptcy Code includes disputed claims and unmatured claims, . . ."). As the court has previously indicated, the intervening creditors also have standing as petitioners in this proceeding. Since there are three qualified petitioners which support the involuntary petition in this proceeding, the court will address the merits of that petition.

. . .

[S]ufficient evidence remains before the court to dictate that it find that Midwest is not generally paying its debts as they come due.

Dept. of Housing, 807 F.2d 1433, 1441 (8th Cir. 1986); *Liddell v. Missouri*, 731 F.2d 1294, 1304-05 (8th Cir., *cert. denied*, 469 U.S. 816 (1984); *see also Arizona v. California*, 460 U.S. 605, 618 (1983) (law of the case is a doctrine of discretion); *Liddell*, 731 F.2d at 1304-05 (the doctrine protects settled expectations of parties, ensures uniformity of decisions and promotes judicial efficiency); *United States v. Unger*, 700 F.2d 445, 450 n.10 (8th Cir.), *cert. denied*, 464 U.S. 934 (1983) (we will reconsider law of the case when substantially different evidence has been introduced or decision is clearly erroneous and works manifest injustice).

Basin does not and could not allege that the filing of the involuntary petition in bankruptcy *for the purpose of realizing on its letter of credit* was a wrongful or negligent act by its officers, directors, or employees. Indeed, the action taken was the only prudent action the directors and officers could

---

> The most significant indication that Midwest is unable to meet its obligations on a current basis is its failure to pay interest on its long-term obligations. An interest payment of $2,786,062.61 was due February 28, 1984. Midwest failed to make that payment. Another interest payment of $2,786,062.61 is due August 31, 1984. Since Midwest is not operating its crushing plant, the court cannot envision that the August 31, 1984 payment of interest will be met. Although Midwest has to this date only missed one interest payment, the missed payment is not of an insubstantial sum and there appears little hope that Midwest will be able to meet these interest payments in the future.
>
> In addition to Midwest's failure to make interest payments on its long-term obligations, Midwest currently has pre-petition obligations to its shareholders in an approximate amount of $696,459.53. . . . Although Midwest has been able to keep current on a large number of its monthly obligations, it has been only able to do so because of a deferral of payments on its obligations to its shareholders, in addition to the large infusions of cash received from its shareholders.

In re: Midwest Processing Co., No. 84-05165, slip op. at 18-19, 21-22 (Bankr. D.N.D. May 24, 1984).

take if they were to protect Basin's security interest in Midwest. They had already thoroughly explored with Midwest an extension of the existing letter of credit or the writing of a new letter. These discussions were unsuccessful.[6] The fact that the district court and this court subsequently held that the filing was in bad faith because it was motivated by an improper reason does not make this prudent action, although ultimately unsuccessful, a "wrongful act" under the terms of section III, paragraph D. To hold otherwise would force the directors and officers to commit a "wrongful act" if they either did or did not file the petition for bankruptcy. In these terms, this conduct appears to be merely a difficult business decision that did not reap the corporation a contingent benefit and not a "wrongful act" as encompassed by the policy. Thus, we have no alternative but to affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[6] Apparently none of the other creditors would have benefited from a filing of Basin's petition of bankruptcy. It appears that no other creditors, secured or unsecured, had a similar agreement to Basin's letter of credit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-5277ND

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK, etc.,

Appellee,

v.

BASIN ELECTRIC POWER COOPERATIVE, etc.,

Appellant.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 25, 1990

Order entered at the direction of the Court:

ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5277ND

CRUM & FORSTER MANAGERS CORPORATION
OF NEW YORK, etc.,

Appellee,

v.

BASIN ELECTRIC POWER COOPERATIVE, etc.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NORTH DAKOTA

Appellant's motion for leave to supplement the record will be taken with the case by the panel to which this appeal is assigned for disposition on the merits.

July 24, 1989
Order Entered Under Rule 5(a)
ROBERT D. ST. VRAIN
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-87-175

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY

Plaintiff,

vs.

BASIN ELECTRIC POWER COOPERATIVE, a North Dakota Electric Cooperative Corporation,

Defendant.

MEMORANDUM AND ORDER

The Defendant in the case has filed a renewed motion for partial summary judgment with the court. A previous motion for summary judgment was denied by the court in an order dated August 22, 1988. The court heard oral argument on the renewed motion for partial summary judgment on April 4, 1989. The facts of the case have been sufficiently related in the court's prior order and therefore, will not be restated in their entirety here.

In the case at bar, Basin Electric Power Cooperative (Basin) purchased an insurance policy from Crum & Forster d/b/a International Insurance Company (Crum & Forster). The policy is described as "an officers and directors error and omissions policy". Crum & Forster is suing for declaratory judgment, seeking a policy construction of "no coverage" for the claim involved.

The basic arguments before the court can be summarized quite easily. It is Basin's position that the settlement agreement entered into by Basin with Midwest Processing and Continental Illinois Bank of Chicago to settle prior litigation between them; arising out of the filing of the involuntary bankruptcy petition in order to draw on the letter of credit, qualifies as a compensable loss under the insurance policy entered into between Basin and Crum & Forster. Crum & Forster, on the other hand, for the purpose of this motion, adopts the position that the payment made under the settlement agreement is a compensable loss as contemplated by the policy, but argues that one or more policy exclusions apply to relieve them of liability. Counsel for defendant is correct in noting that under the pending motion, the only issue to be resolved by the court is whether any of the exclusions apply to relieve Crum & Forster of liability.

The Court, however, does not agree with the parties characterization of the issues before it. The construction of a written contract of insurance is a question of law to be resolved by the court. *Link v. Federated Mut. Ins. Co.*, 386 N.W. 2d 897 (N.D. 1986). The court believes that the fundamental question of coverage under the policy still exists. Specifically, it must be determined whether the payment made by Basin to settle the Midwest and Continental litigation, comprises a compensable loss under the terms of the insurance policy. Therefore, the court will address this issue upon its own motion.

The insuring agreements stated in the insurance policy provides:

> [T]he company will pay on behalf of the insureds all Loss which the insureds shall be legally obligated to pay for any civil claim or claims first made against them

> because of Wrongful Act, provided that the claim is first made during the policy period and written notice of the claim is received by the Company during the policy period. The company will reimburse the entity for all loss for which the entity shall be required by law to indemnify individual insureds for any civil claim or claims first made against them because of a Wrongful Act, provided that the claim is first made during the policy period and written notice of said claim is received by the Company during the policy period.

Under the policy, "insureds" are defined as "the Entity and any individual who was, now is, or shall be a Director, Officer, Trustee, Employee, Volunteer, or Staff member of the Entity and shall include any Executive, Board Member and Committee Member whether salaried or not." "Entity" is defined as "only that non-profit Organization, Association or Corporation which is named in the Declarations and is legally constituted at the inception date of this policy and any non-profit subsidiaries that existed at the time the application was completed."

The term "Wrongful Act" means "any act or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of the individual Insureds while acting in their capacity as an authorized representative of the Entity." Finally, the term "loss" as used in the policy is defined as:

> [a]ny amount which the Insureds are legally obligated to pay or which the Entity shall be required, or permitted by law to pay as indemnity to the Insureds, for any claim or claims made against them, for Wrongful Acts and shall include but not be limited to damages, judgments, settlements and costs, cost of investigation

> and defense of legal actions (excluding from such cost the salaries of officials or employees of the Entity), claims or proceedings and appeals therefrom, cost of attachment or similar bonds; provided always however, such subject loss shall not include fines or penalties imposed by law, or matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

As stated above, the court's first concern is to determine whether the payment made by Basin under the settlement agreement to Midwest and Continental comprised a compensable loss under the policy. In order to do so, a short review of the facts of the underlying litigation between Basin, Midwest and Continental is necessary.

Basin made a very sizeable investment in equipping a power generating plant to furnish power to a sunflower crushing plant, using sunflower hulls as a source of fuel. To partially guarantee performance of the purchase and sale contracts with the crushing plant, Basin required the provision of a $5 million letter of credit. The letter of credit furnished had an expiration date, and the processing plant began experiencing financial difficulty.

Faced with the expiration of the letter of credit and what they saw as the inevitable default of the crushing plant, Basin's employees and legal staff filed an involuntary bankruptcy petition against the crushing plant: the only method available to them to trigger payment under the letter of credit. As such bankruptcy filing was a condition requiring payment, the $5 million was paid to Basin.

The bankruptcy petition was later dismissed, and the initial filing held to have been an act done "in bad faith." The district court, Honorable Bruce M. Van Sickle, found that the purpose

of the bankruptcy filing was to cause payment to be made under the letter of credit and not for any valid purpose or function of the bankruptcy court; and therefore, in bad faith. The circuit affirmed, leading to a reasonable assumption that the bankruptcy filing should not be deemed an effective method of causing payment to be made under the letter of credit.

Suit was then brought against Basin, seeking the return of the $5 million, accrued interest, and the costs related to the prior and present litigation. Basin tendered the defense to Crum & Forster. When the tender was refused, Basin settled by returning the $5 million, the accrued interest, and approximately $500 thousand in "other damages" over and above the principal and interest.

After reviewing the policy, and the facts and circumstances giving rise to Basin's claim under it, it is inconceivable to the court that the policy provides coverage for the $5 million and accrued interest. Therefore, as a preliminary threshold, it will be the order of the court that the policy provides no coverage applicable to the return of property acquired by "wrongful act" by either the entity or the other insureds. If Basin cannot show an entitlement to the $5 million under a commercial contract, it certainly cannot obtain the same result under the insurance contract. Such a result is clearly unconscionable.

This leaves the court to decide whether the balance of the settlement agreement comprises a compensable loss under the policy. When the language of an insurance policy is clear and explicit, the language should not be strained in order to impose liability upon the insurer. *Links vs. Federated Mut. Ins. Co.*, 386 N.W.2d 897, 900 (N.D. 1986). A review of the policy shows a clear purpose of protecting officers and directors from liability to third parties arising from errors and omissions of the officer/director; and if Basin—the entity—pays

out on behalf of the officer or director, Basin is also protected.

The policy is clearly not intended to insure that Basin suffers no business reversals through errors in judgment made by officers and directors in managing the company./

Under the facts of this case, no officer, director, or employee was faced with any liability to any third party which was claimed to have arisen from any error or omission. No event occurred which could create personal liability of any officer, director, or employee to either a third party or to Basin, the employer. Therefore, based upon this analysis, it is the finding of this court that no portion of the money paid out under the settlement agreement comprised a compensable loss as contemplated by the clear language of the insurance policy between the parties.

The final accounting of the investment loss to Basin involving the sunflower processing plant is not yet complete. Using the remarkable clarity of vision permitted by hindsight, the letter of credit was not a foolproof security. It expired after one year and, if no condition of payment had occurred, became a nullity. Basin retained no leverage to force renewal. The involuntary bankruptcy petition was the only method available and was used, although without sufficient identified creditors.

The point is clear, admitted and without question that the petition was filed only for the purpose of triggering the letter of credit payment. Based on the previous holdings in *Basin Electric Power Cooperative, et al., v. Midwest Processing Company*, No. A4-84-148, (D.N.D. Dec. 14, 1984) and *Basin Electric Power Coop. vs. Midwest Processing Co.*, 769 F.2d 183 (8th Cir. 1985), the filing would have been in bad faith regardless of the number of creditors.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment can only be granted if there are no genuine

issues of material fact. Fed.R.Civ.P. 56. After further review of the record, and upon hearing oral argument in the case at bar, it is the finding of the court that no genuine issues of material fact are present. Therefore summary judgment is appropriate at this time.

BASED ON THE FOREGOING, IT IS THE ORDER OF THIS COURT THAT SUMMARY JUDGMENT BE GRANTED IN FAVOR OF THE PLAINTIFF.

Dated this 18th day of April, 1989.

PATRICK A. CONMY,
Chief Judge
United States District Court

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 18th day of April, 1989.

EDWARD J. KLECKER, CLERK

By: Deborah Thomson, Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A1-87-175

CRUM & FORSTER MANAGERS CORPORATION
OF NEW YORK d/b/a INTERNATIONAL
INSURANCE COMPANY

Plaintiff,

vs.

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota Electric Cooperative Corporation,

Defendant.

MEMORANDUM AND ORDER

The Plaintiff in the above-named action filed a motion for summary judgment under Rule 56(a) of the Federal Rules of Civil Procedure, on April 3, 1988. The Plaintiff is an insurance company and affords insurance coverage to the Defendant. The Defendant purchased director, officer and entity liability insurance from the Plaintiff for claims made between June 30, 1984 and June 30, 1987. The primary issue in this case is whether or not the actions of the Defendant fall within certain exclusions stated in the policy thereby relieving the Plaintiff of any liability under the policy.

The present action for declaratory relief under 28 U.S.C. §2201 is only one of several legal proceedings which have spawned from the business dealings of the Defendant and

one Midwest Processing Company. The facts pertinent to this motion are as follows.

In March of 1984, the Defendant filed an involuntary bankruptcy petition against the Midwest Processing Company in order to draw on a $5 million letter of credit. The letter of credit was held by Continental Illinois National Bank and Trust Company of Chicago, given to the Defendant by Midwest as security for payment of a contractual obligation. The involuntary petition was subsequently dismissed by the district court and the dismissal affirmed by the Eighth Circuit Court of Appeals, because it was found to have been filed in bad faith. *See, Basin Electric Power Cooperative v. Midwest Processing Company*, 769 F.2d 483 (8th Cir. 1985), *cert. denied* 106 S.Ct. 854 (1986). The Defendant, however, received the proceeds of the letter of credit before the petition was dismissed.

After the dismissal of the bankruptcy petition, Continental and Midwest sued Defendant to recover certain sums of money which each had to pay out because of the bad faith filing of the involuntary bankruptcy petition. The Defendant notified the Plaintiff of the pending cause of action, but the Plaintiff refused to defend. Ultimately, the Defendant settled the lawsuit out of court for $6.9 million. The Defendant notified the Plaintiff of the settlement prior to settling. After settling, the Defendant formally demanded reimbursement for the settlement amount, legal fees and costs, but the Plaintiff denied any coverage under its insurance policy and brought this action for declaratory judgment.

A motion for summary judgment is appropriate where there are no genuine issues of material fact, and it appears that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In the case at bar, Plaintiff's whole argu-

ment is based upon the theory of collateral estoppel. Plaintiff argues that the Defendant is collaterally estopped from contesting the district court's findings in *Basin Electric Power Cooperative v. Midwest Processing Company*, supra.

As stated above, the district court in *Basin Electric* found that the Defendant had filed an involuntary bankruptcy petition in bad faith. The Plaintiff, in this motion, argues that the finding of bad faith in that proceeding, precludes recovery under the insurance policy between the parties. The relevant policy exclusions cited by the Plaintiff are:

> The Company shall not be liable to make payment for Loss in connection with any claim made against the Insureds allegedly, based upon or arising out of one or more of the following:
>
> 1. An Insured gaining any personal profit or advantage to which they were not legally entitled;
>
> 2. The return by the Insureds of any remuneration paid in fact to them if payment of such remuneration shall be held by the courts to be in violation of law;
>
> 3. Brought about or contributed to by the dishonesty of the Insureds, however, notwithstanding the foregoing, the Insureds shall be protected under the terms of this policy as to any claim upon which suit is brought against them by reason of any alleged dishonesty on the part of the Insureds, unless a judgment or other final adjudication thereof adverse to the Insureds shall establish that acts of active and deliberate dishonesty committed by the Insureds with actual dishonest purpose and intent were material to the cause of action so adjudicated;
>
> . . .
>
> 7. The willful violation of statute or ordinance committed by or with the knowledge or consent of an insured.

It is the Plaintiff's contention that the finding of bad faith by the district court, in the bankruptcy proceeding, is tantamount to a finding of dishonesty or one of the other forms of conduct which excludes coverage under the policy. Furthermore, Plaintiff argues the Defendant is foreclosed from litigating the issue of conduct in the present action because of collateral estoppel. The Plaintiff therefore concludes that it is entitled to summary judgment because the prior adjudication of Defendant's bad faith in the bankruptcy proceeding, qualifies as conduct excluded under the language of the insurance policy.

In order to assert collateral estoppel against a party, the asserting party must establish: a) the issue is identical to the one in the prior adjudication; b) there was a final judgment on the merits; c) the estopped party was a party, or in privity with a party, in the prior action; and d) the estopped party had a full and fair opportunity to be heard on the adjudicated issue. *Oldham v. Pritchett*, 599 F.2d 274, 179 (8th Cir. 1979). Furthermore, collateral estoppel is an issue of substantive law, and a federal court sitting in diversity is required to apply state substantive law, *Kuehn v. Garcia*, 608 F.2d 1143 (8th Cir. 1979); unless the claim arises under federal law, *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982).

In the case at bar, the claim arises under state law, i.e., whether or not the exclusions of the insurance policy preclude recovery by the Defendant. The next question to answer is which state's law applies. In *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that diversity actions are governed by the substantive law of the forum state. Therefore, since this cause of action is a diversity action and the forum state is North Dakota, North Dakota law will be controlling.

In order for a party to assert collateral estoppel under North Dakota law, the party asserting it must have been a party or in privity with a party to the previous adjudication. *Sturdevant v. SAE Warehouse, Inc.*, 270 N.W.2d 794, 798 (N.D. 1978). Clearly, in the case at bar, the Plaintiff does not meet either the mutuality or the privity requirement of *Sturdevant*. The Plaintiff was in no way connected to the prior bankruptcy decisions and therefore cannot assert collateral estoppel based upon those previous judgments. Therefore, the Plaintiff cannot assert a collateral estoppel argument.

Furthermore, the Plaintiff's collateral estoppel argument fails for a more fundamental reason. One of the four elements to be established before collateral estoppel can be asserted, is that the issue in the prior adjudication be identical to the issue in the present case. The doctrine of collateral estoppel bars re-litigation of an issue which is identical in all respects to an issue that was previously determined, where the controlling facts and applicable legal principles remain the same. *Sydnes v. Commissioner of Internal Revenue*, 647 F.2d 813 (8th Cir. 1981). If the issue which was previously adjudicated differs significantly from the issue presented in the later proceeding, collateral estoppel is not applicable. *Penntech Papers, Inc. v. N.L.R.B.*, 706 F.2d 18, 23 (1st Cir. 1983).

In the present case, Plaintiff relies heavily on the district court's findings of bad faith on the part of the Defendant in filing the bankruptcy petition in *Basin Electric Power Cooperative v. Midwest Processing Company*, supra. In fact, Plaintiff argues that the finding of "bad faith" in that proceeding can be transposed into a finding of "bad faith" or "dishonesty" in the present case. The Plaintiff further argues that the terms "bad faith" and "dishonesty" are synonymous.

This court disagrees with Plaintiff's contention that "bad faith" for the purposes of bankruptcy law is the same as "bad

faith" or "dishonesty" in an action to decide whether exclusions under a contract of insurance precludes recovery by the insured. The Bankruptcy Code was established for a specific purpose, and is interpreted with a specific Congressional intent in mind: to protect the interests of the creditors, as well as those of the debtor. Preferential transfers between debtor and particular creditors are discouraged. Thus, "bad faith" in the bankruptcy context generally refers to creditor's attempt to place himself in a "preferred" position, in degradation of the rights of other creditors. This is clearly different from what the Plaintiff is asserting in its brief in support of its motion. The Plaintiff attempts to transform issues which are essentially unrelated, to ones that are identical by the use of semantics. This the court cannot allow. Therefore, since the issue in the two cases are not identical, the collateral estoppel argument is invalid on its face. However, this finding only invalidates Plaintiff's motion for summary judgment dealing with those exclusions which preclude recovery because to the insured's dishonest conduct.

A stronger argument for summary judgment can be based upon the first exclusion stated above. It is clear from the facts that Defendant was not entitled to draw on the $5 million letter of credit. Therefore, Continental Illinois National Bank and Trust Company of Chicago was entitled to recoup the money, plus any interest. This is where the first exclusion would probably apply to exclude coverage under the policy. However, matters are complicated by the fact that the lawsuit between Continental and the Defendant, which was also joined by Midwest, was settled out of court. The settlement reached by the parties included the amount drawn on the letter of credit, interest and some additional amounts of damages. It is unclear under the facts of this case as to whether the dam-

ages portion of the settlement would be covered by one of the exclusions stated in the policy. Therefore, summary judgment would be inappropriate at this time.

In *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), the Court stated that summary judgment will not lie if the dispute about a fact is "genuine," i.e., if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 2510. In the case at bar, a genuine dispute is present concerning whether the Defendant's conduct was of the type which precludes total recovery under the insurance policy between the parties. Therefore, summary judgment cannot be granted.

BASED ON THE FOREGOING, IT IS THE ORDER OF THIS COURT THAT THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BE DENIED.

Dated this 22nd day of August, 1988.

PATRICK A. CONMY,
Chief Judge
United States District Court

APPENDIX F

International Insurance Company
North River Insurance Company
United States Fire Insurance Company

NON-PROFIT ORGANIZATION LIABILITY INSURANCE
THIS IS A CLAIMS MADE POLICY.
READ YOUR POLICY CAREFULLY.

IN CONSIDERATION of the payment of the premium and subject to all of the terms, conditions and exclusions of this Policy, the Company agrees with the Insureds under Coverage A and the Entity under Coverage B as follows:

INSURING AGREEMENTS

I. Coverages A and B

A. The Company will pay on behalf of the Insureds all Loss which the Insureds shall be legally obligated to pay for any civil claim or claims first made against them because of a Wrongful Act, provided that the claim is first made during the policy period and written notice of said claim is received by the Company during the policy period.

B. The Company will reimburse the Entity for all Loss for which the Entity shall be required by law to indemnify individual insureds for any civil claim or claims first made against them because of a Wrongful Act, provided that the claim is first made during the policy period and written notice of said claim is received by the Company during the policy period.

II. Extensions

This Policy shall cover Loss arising from any civil claim or claims made against the estates, heirs, legal representatives or assigns of deceased persons who were the Insureds at the time

of the Wrongful Act upon which such civil claim or claims are based, and the legal representatives or assigns of the Insureds in the event of their incompetency, insolvency or brankruptcy.

III. Definitions

A. "Insureds" shall mean the Entity and any individual who was, now is, or shall be a Director, Officer, Trustee, Employee, Volunteer or Staff member of the Entity and shall include any Executive, Board Member and Committee Member whether salaried or not.

B. "Entity" shall mean only that non-profit Organization, Association or Corporation which is named in the Declarations and is legally constituted at the inception date of this policy and any non-profit subsidiaries that existed at the time the application was completed. Coverage will automatically apply to all non-profit subsidiaries formed or acquired after the inception date of this policy, subject to (1) written advice to the company within 90 days of acquisition or formation, and (2) payment of any additional premium required.

C. "Subsidiary" shall mean any non-profit Organization, Association or Corporation of which the Entity named in A. of the Declarations Page owns more than 50% of the outstanding voting stock.

D. The term "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of the individual Insureds while acting in their capacity as an authorized representative of the Entity, subject to the further terms, conditions and limitations of this policy.

E. "Loss" shall mean any amount which the Insureds are legally obligated to pay or which the Entity shall be required, or permitted by law to pay as indemnity to the Insureds, for any claim or claims made against them, for Wrongful Acts

and shall include but not be limited to damages, judgments, settlements and costs, cost of investigation and defense of legal actions (excluding from such cost the salaries of officials or employees of the Entity), claims or proceedings and appeals therefrom, cost of attachment or similar bonds; provided always, however, such subject of loss shall not include fines or penalties imposed by law, or matters which may be deemed uninsurable under the law pursuant to which this Policy shall be construed.

F. "Policy Year" shall mean the period of one year following the effective date and hour of this Policy or any anniversary thereof, or if the time between the effective date or any anniversary and the termination of the Policy is less than one year, such lesser period.

IV. Exclusions

The Company shall not be liable to make payment for Loss in connection with any claim made against the Insureds allegedly, based upon or arising out of any one or more of the following:

1. An insured gaining any personal profit or advantage to which they were not legally entitled;

2. The return by the Insureds of any remuneration paid in fact to them if payment of such remuneration shall be held by the courts to be in violation of law;

3. Brought about or contributed to by the dishonesty of the insureds, however, notwithstanding the foregoing, the Insureds shall be protected under the terms of this policy as to any claims upon which suit is brought against them by reason of any alleged dishonesty on the part of the Insureds, unless a judgment or other final adjudication thereof adverse to the Insureds shall establish that acts of active and deliberate dishonesty committed by the

Insureds with actual dishonest purpose and intent were material to the cause of action so adjudicated;

4. a. Claims, demands or actions seeking relief, or redress, in any form other than money damages;

b. For fees or expenses relating to claims, demands or actions seeking relief or redress, in any form other than money damages;

5. a. Any damages, whether direct, indirect or consequential, arising from, or caused by, bodily injury, personal injury, sickness, disease or death;

b. Loss or criminal abstraction of, damage to or destruction of any tangible property or the loss of use of such property by reason of the foregoing;

6. a. Defamation, including, but not limited to libel or slander;

b. A publication or utterance in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the Entity;

7. The willful violation of statute or ordinance committed by or with the knowledge or consent of an insured;

8. The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water;

9. The Insured's activities in a fiduciary capacity as respects any employee benefit plan.

Exclusions (1.) and (2.) do not apply to Coverage B.

CONDITIONS

V. Proposal Form

1. It is agreed that the particulars and statements contained in the written proposal form, copy of which is attached hereto, and the Declarations are reaffirmed as of the inception

date of this Policy, and are the basis of this Policy and are considered as incorporated and constituting part of this Policy.

2. Any fact pertaining to any Insured shall not be imputed to any other Insured for the purpose of determining the application of any of the above enumerated exclusions.

3. In issuing this policy, the company has relied on the declarations and statements which are contained in the proposal form (a copy of which is attached hereto) and which are deemed to be incorporated in this policy, provided, however, that except for material facts or circumstances known to the person who subscribed the proposal form, any misstatement or omission in such proposal form in respect of a specified wrongful act by a particular director, officer or employee or his cognizance of any matter which he has reason to suppose might afford grounds for a future claim against him shall not be imputed to any other director, officer or employee for purposes of determining the availability of coverage under this policy.

VI. Discovery Period

If the Company shall cancel or refuse to renew this Policy, or the Entity or the Insured cancels or does not renew the Policy, the Entity or the Insureds shall have the right, upon payment of an additional premium of 25% of the premium hereunder, to an extension of the cover granted by this Policy in respect of any claim or claims which may be made against the Insureds during the period 12 months after the date of such cancellation or non-renewal, but only in respect of any Wrongful Act committed before the date of such cancellation or non-renewal, provided, however, that the application of this extension must be made to the Company in writing and payment of the premium must be made 10 days prior to the effective date of cancellation or within 10 days following expiration of the Policy.

VII. Limits of Liability

Regardless of the number of (a) Insureds under this Policy, (b) persons or organizations who sustain loss from Wrongful Acts, or (c) claims made or suits brought on account of Wrongful Acts or otherwise, the Company's liability is limited as follows:

The Limit of Liability specified in the declaration hereof shall be the maximum liability for any one claim and shall be the aggregate limit for each policy year.

With respect to the Insured's Retention as stated in the Declarations, the Company shall only be liable to pay, subject to the Limits of Liability provisions stated above, for Loss in excess of such Retention in respect of each and every Loss hereunder, and such retention applies separately to Coverages A and B. The Insured agrees that such Retention shall be uninsured.

In the event this Policy is extended in accordance with provisions of the Discovery Clause above, the Company's total liability shall not exceed the "aggregate for each policy period" limit of liability shown on the declarations for the last policy period in which coverage is provided hereunder plus the period of twelve (12) months set out in Conditions VI, Discovery Clause.

VIII. Loss Provision

If during the policy period or extended discovery period:

(a) The Entity or any Insureds shall receive written or oral notice from any party that it is the intention of such party to hold one or more Insureds responsible for the results of any specified Wrongful Act done or alleged to have been done by the Insureds while acting in the capacity aforementioned; or

(b) The Entity or any one of the individual Insureds shall become aware of any occurrence which may subsequently give rise to a claim being made against an insured in respect of any such alleged Wrongful Act;

Then the Entity or the Insureds shall as soon as practicable give written notice to the Company of the receipt of such written or oral notice under Clause VIII. (a) or of such occurrence under Clause VIII. (b). Upon the Company receipt of such notice any claim which may subsequently be made against the insureds arising out of such alleged Wrongful Act shall, for the purpose of this Policy, be treated as a claim made during the policy period in which such notice was given or if given during the extended discovery period as a claim made during such discovery period.

The Entity or the Insureds shall, as a further condition precedent to the Insureds' right to be indemnified under this Policy, shall give the Company any information and all such cooperation as they may reasonably require and as shall be in the insureds' power.

IX. Defense and Settlement

In the event of a claim, the Insureds shall take reasonable measures to protect their interests. If defense of result shall be required then the Insured shall appoint counsel.

No costs or expenses shall be incurred on behalf of the Company under any circumstances without its consent, which consent, once given, may be withdrawn at any time but may not be unreasonably withheld. In the event the Insured and the Company cannot agree on the allocation or apportionment of counsel's fees and expenses, then under such circumstances the Insured's right of indemnity for such expenses and fees shall not mature until the claim giving rise thereto has been finally and completely adjudicated and/or settled.

The Company, at its option, shall have the right at its own expense to investigate any claim and/or negotiate the settlement thereof, as it deems expedient, but the Company shall not commit the Entity or the Insureds to any settlement without their consent.

If, however, any insured shall refuse to consent to any settlement recommended in writing by the Company and shall elect to contest the claim or continue any legal proceedings in connection with such claim, then subject to the provisions of condition VII; the Company's liability for the claim shall not exceed the amount for which the claim could have been settled including costs, charges and expenses incurred with its consent up to date of such refusal.

X. Action Against the Company

No action shall lie against the Company unless as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy, and until the amount of the Insureds' obligation to pay shall have been finally determined either by judyment against the Insureds after actual trial or by written agreement of the Insureds, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join the Company as a party to any action against the Insureds, to determine the Insureds' liability, nor shall the Company be impleaded by the Insureds or their legal representative. Bankruptcy or insolvency of the Insureds or of the Insureds' estate shall not relieve the Company of any of its obligations hereunder.

XI. Subrogation

In the event of any payment under this Policy, the Company shall be subrogated to all the Insureds' rights of recovery therefore against any person or organization and the Insureds shall execute and deliver such instruments and papers and do whatever else is necessary to secure such rights. The Insureds shall do nothing after Loss to prejudice such rights.

XII. Changes

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms of this Policy, nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.

XIII. Assignment

Assignment of interest under this Policy shall not bind the Company until its consent is endorsed hereon.

XIV. Authorization Clause and Notices

Any acceptance of this Policy, all Insureds agree that the Entity shall act on behalf of all Insureds with respect to the giving and receiving of notice of claim or cancellation, the payment of premiums and the receiving of any return premiums that may become due under this Policy. Notice to that individual named in the Proposal and the address of the Entity shall also constitute notice to all insureds.

All notices of claims or any other notice required to be given to the Company under this Policy shall be addressed to the name of the Insurer, 100th Floor, Sears Tower, 233 South Wacker Drive, Chicago, Illinois 60606.

XV. Terms of Policy Conformed to Statute

Terms of this Policy which are in conflict with the statutes of the State wherein this Policy is issued are hereby amended to conform to such statutes.

XVI. Cancellation

This Policy may be cancelled by the Entity for itself and all other insureds by surrender hereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. If the Entity cancels, earned premium shall be computed in accordance with the customary short rate table and procedure.

If the Company cancels, it shall mail to the Entity at the last mailing address known by the Company, written notice stating when not less than 30 days thereafter such cancellation shall be effective. Such notice of cancellation sent by the Company to the Entity shall be effective notice of Cancellation and bind all Insureds entitled to claim the benefits of this policy. This policy may also be cancelled by not less than 5 days notice when the cancellation is being effected by reason of the Insureds nonpayment of premium. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. If the Company cancels, earned premium shall be computed pro-rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

XVII. Acceptance

By acceptance of this Policy, the Entity and the Insureds agree that this Policy embodies all agreements existing between themselves and the Company or any of its agents relating to this insurance.

XVIII. Other Insurance

If the Entity or any Insured has other insurance insuring against a Loss covered by this Policy, the insurance provided by this Policy shall apply in excess of such other insurance.

XIX. Excess Limits Consent

It is agreed that the limit of coverage provided hereunder is the total limit insured and that no further insurance excess of this Policy shall be purchased without the written consent of this insurer.

XX. Nuclear Energy Liability Exclusion (Broad Form)

It is agreed that the policy does not apply:

1. Under any Liability coverage, to injury, sickness, disease, death or destruction

(a) with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability, or

(b) resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (2) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

2. Under any Medical Payments Coverage, or under any Supplementary payments provision relating to immediate medical or surgical relief, to expenses incurred with respect to bodily injury, sickness, disease or death resulting from the hazardous properties of nuclear material and arising out of the operation of a nuclear facility by any person or organization.

3. Under any Liability Coverage, to injury, sickness, disease, death or destruction resulting from the hazardous properties of nuclear material, if

(a) the nuclear material (1) is at any nuclear facility owned by or operated by or on behalf of, an insured or (2) has been discharged or dispersed therefrom;

(b) the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

(c) the injury, sickness, disease, death or destruction arises out of the furnishing by an Insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to injury to or destruction of property at such nuclear facility.

4. As used in this section

"hazardous properties" includes radioactive, toxic or explosive properties;

"nuclear material" means source material, special nuclear material or byproduct material;

"source material", "special nuclear material", and "byproduct material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a nuclar reactor;

"waste" means any waste material

(a) containing by-product material other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, and

(b) resulting from the operation by any person or organization of any nuclear facility included under the first two paragraphs of the definition of nuclear facility.

"nuclear facility" means

(a) any nuclear reactor,

(b) any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing spent fuel, or (3) handling, processing or packaging waste,

(c) any equipment or device used for the processing, fabricating or alloying of special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235,

(d) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste,

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations;

"nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain

reaction or to contain a critical mass of fissionable material;

With respect to injury to or destruction of property the word "injury" or "destruction" includes all forms of radioactive contamination of property.

IN WITNESS WHEREOF, the Company has caused this Policy to be signed by its Vice Chairman of the Board and Secretary but this Policy shall not be binding upon the Company unless completed by the attachment hereto of a Declarations page and countersigned on the aforesaid Declarations page by a duly authorized representative of the Company.

ANTOINETTE C. BENTLEY
Secretary

SIDNEY F. WENTZ
Vice Chairman of the
Board

Endorsement
BS01

Amendatory Endorsement

IT IS UNDERSTOOD AND AGREED THAT THE FOLLOWING AMENDMENTS ARE MADE HERE TO:

1) EXCLUSIONS 4(a) AND (b), 6(a) AND (b), 7 and 9 ARE DELETED IN THEIR ENTIRETY.
2) IN THE FIRST LINE OF CLAUSE 1.B. THE WORDS "REQUIRED BY LAW" ARE AMENDED TO READ "REQUIRED OR PERMITTED BY LAW."
3) THE WORD "CIVIL" SHALL BE DELETED WHEREVER IT MAY APPEAR.
4) CLAUSE XIX EXCESS LIMITS CONSENT IS DELETED IN ITS ENTIRETY.

5) EXCLUSION 5(a) IS AMENDED TO READ "ANY DAMAGES FOR BODILY INJURY, SICKNESS, DISEASE OR DEATH;"

6) CLAUSE VI, DISCOVERY PERIOD, IS AMENDED TO READ 30 DAYS IN LIEU OF 10 DAYS.

7) SECTION IX IS DELETED IN ITS ENTIRETY AND THE FOLLOWING SUBSTITUTED THEREFORE:

IX DEFENSE IN SETTLEMENT.

IN THE EVENT OF A CLAIM, THE INSURED SHALL TAKE REASONABLE MEASURES TO PROTECT THEIR INTEREST. IF DEFENSE OF A SUIT SHALL BE REQUIRED THEN THE INSURED SHALL APPOINT COUNCIL.

NO COST OR EXPENSES SHALL BE INCURRED ON BEHALF OF THE COMPANY UNDER ANY CIRCUMSTANCES WITHOUT ITS CONSENT, WHICH CONSENT, ONCE GIVEN, MAY BE WITHDRAWN AT ANY TIME BUT MAY NOT BE UNREASONABLY WITHHELD.

THE COMPANY AGREES, SUBJECT TO THE ABOVE PROVISIONS, TO PAY LEGAL FEES AND EXPENSES INCURRED IN THE DEFENSE OF SUITS ARISING OUT OF CLAIMS MADE UNDER THIS POLICY SUBJECT TO A MAXIMUM OF $25,000 FOR EACH CLAIM AND A MAXIMUM OF $50,000 IN AGGREGATE FOR TWO OR MORE CLAIMS MADE IN EACH POLICY YEAR. THEREAFTER, THE INSUREDS RIGHT TO INDEMITY FOR ADDITIONAL EXPENSES AND FEES SHALL MATURE WHEN THE CLAIM GIVING RISE, THERETO HAS BEEN FINALLY AND COMPLETELY ADJUDICATED AND/OR SETTLED; OR, AT SUCH OTHER

TIME AS MUTUALLY AGREED TO BY THE COMPANY AND THE INSURED.

This endorsement is a part of your policy and takes effect on the effective date of your policy, unless another effective date is shown below.

Complete only when this endorsement is not prepared with the policy or is not to be effective with the policy.

Effective on and after ..... 198 ..... 12:01 a.m. standard time.

issued to .....

issued by ..... insurance Company

Expiration date .....

Countersigned by

G. S. DAHNS

Authorized Representative

Supreme Court, U.S.
FILED
JAN 31 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-1017

In The

Supreme Court of the United States

October Term, 1990

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative association,
Petitioner,

v.

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

JAY FIEDLER
LETNES, MARSHALL,
FIEDLER & CLAPP, LTD.
401 DeMers Avenue
Suite 202
Grand Forks, ND 58206
Phone: (701) 772-3407
Attorneys for Respondent

Associated Printers • 402 Hill Ave • Grafton, ND 58237 • (701) 352-0640
1321 DeMers Ave • Grand Forks, ND 58201 • (701) 772-4869

QUESTIONS PRESENTED

Despite the Petitioner Basin Electric Power Cooperative's (hereinafter "Basin") assertions otherwise, the questions presented here have been presented, briefed and argued and are the same arguments presented in Basin's appeal to the Eighth Circuit Court of Appeals.

Properly stated, the question presented is whether the Court of Appeals properly affirmed a summary judgment in favor of the Respondent, although for reasons other than those stated by the District Court, when the Court of Appeals' decision has adequate basis in the record and the arguments made by Petitioner are the same as those presented below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

A. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS AFFIRMING SUMMARY JUDGMENT IN FAVOR OF CRUM & FORSTER DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL COURT OF APPEALS, OR ANY STATE COURT OF LAST RESORT AND, IN FACT, IS CONSISTENT WITH THE DECISIONS OF BOTH THIS COURT AND THE CIRCUIT COURTS OF APPEALS. 6

B. BASIN HAS HAD A FULL, FAIR AND REASONABLE OPPORTUNITY TO PRESENT EVIDENCE AND LEGAL ARGUMENT RELATING TO ALL ISSUES IN THIS CASE. .. 13

C. THIS CASE PRESENTS ISSUES NARROW IN SCOPE AND OF NO NATIONAL SIGNIFICANCE. 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: Page

Alfaro Motors, Inc. v. Ward, 814 F.2d 883 (2nd Cir. 1987) . 16

Basin Electric Power Cooperative v. Midwest Processing Company, 769 F.2d 483 (8th Cir. 1985), cert. denied 474 U.S. 1083 (1985) 4

Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440 (5th Cir. 1990) 17

British Airways Board v. Port Authority of New York, 558 F.2d 75 (2nd Cir. 1977) 11

Brown v. Southwestern Bell Telephone Co., 901 F.2d 1250 (5th Cir. 1990) 17

Brown v. St. Louis Police Department, 691 F.2d 393 (8th Cir. 1982), cert. denied 461 U.S. 908 (1983) 19

Catter v. Arkansas Louisiana Gas Co., 765 F.2d 730 (8th Cir. 1985) 18

Chongris v. Board of Appeals, 811 F.2d 36 (1st Cir. 1987), cert. denied 483 U.S. 1021 (1987) 18

Colorado Flying Academy, Inc. v. United States, 724 F.2d 871, 880 (10th Cir. 1984), cert. denied 476 U.S. 1182 (1986) 19

Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432 (9th Cir. 1986) 18

Hormel v. Helvering, 312 U.S. 552 (1940) 7, 9, 16

J.E. Riley Investment Co., Inc. v. Nexxus Products Co., Inc., 801 F.2d 1001 (7th Cir. 1986) 17

Johnson v. Orr, 776 F.2d 75 (3rd Cir. 1985) 17

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990) 18

Lindsey v. Dayton Hudson Corporation, 592 F.2d 1118, 1124, cert. denied 444 U.S. 856 (1979) 19

Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5 (1st Cir. 1990) 16

Proctor v. State Farm Mutual Automobile Insurance Company, 675 F.2d 308 (D.C. Cir. 1982) 11

Railroad Labor Executives Association v. Stanton Island Railroad, 792 F.2d 7 (2nd Cir. 1986), cert. denied 479 U.S. 1054 (1987) 19

Rich v. United States Lines, Inc., 596 F.2d 541 (3rd Cir. 1979) 11

Riley v. Commissioner of Internal Revenue, 311 U.S. 55 (1940) 16

Russ-Kwik Car Wash v. Marathon Petroleum, Co., 772 F.2d 214 (6th Cir. 1985) 17

Sally Beauty Co., Inc. v. Nexxus Products Co., Inc., 801 F.2d 1001 (7th Cir. 1986) 17

Singleton v. Wulff, 428 U.S. 106 (1975) 9, 10, 11, 12

Stoetzel v. Continental Textile Corporation of America, 768 F.2d 217 (8th Cir. 1985) 18

STATUTES:

28 U.S.C. §2201 3

No. 90-1017

In The

Supreme Court of the United States

October Term, 1990

BASIN ELECTRIC POWER COOPERATIVE,
a North Dakota electric cooperative association,
Petitioner,

v.

CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK d/b/a INTERNATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Parties

Midwest Processing Company (hereinafter "Midwest") is a company which operated a sunflower seed processing plant near Velva, North Dakota. Midwest and Basin Electric Power Cooperative (hereinafter "Basin") had entered into contractual agreements. To secure certain obligations under

those agreements, Continental Illinois National Bank & Trust Company of Chicago (hereinafter "Continental") issued a Letter of Credit in favor of Basin in the amount of $5,000,000. A condition of payment on the Letter of Credit was the filing of a Bankruptcy Petition by, or against, Midwest.

Crum & Forster afforded coverage to Basin under a non-profit organization liability policy of insurance.

B. The Policy of Insurance

Under the Policy of insurance, Crum & Forster agreed to pay on behalf of the insured's "Losses" arising out of the "Wrongful Acts" and Losses for which the entity would be required by law to indemnify individual insureds for any civil claim or claims.

"Entity" was defined as meaning only Basin.

"Insureds" was defined to mean Basin and any individual who is a director, officer, trustee, employee, volunteer or staff member of Basin.

"Wrongful act" was defined to mean any error or misstatement or misleading statement or act or omission or neglect or breach of duty by one or more of the individual insureds while acting in their capacity as an authorized agent of Basin.

"Loss" was defined to mean any amount which the insureds are legally obligated to pay or which Basin would be required, or permitted by law to pay as indemnity to the insureds, for any claim or claims made against them for wrongful acts.

The policy also contained certain exclusions. These exclusions included claims arising out of any one or more of

the following:

1. An insured gaining any personal profit or advantage to which they were not legally entitled;

2. The return by the insureds of any renumeration paid in fact to them if payment of such renumeration shall be held by the Courts to be in violation of law;...

3. Brought about or contributed by the dishonesty of the insureds, however, notwithstanding the foregoing, the insureds shall be protected under the terms of this policy as to any claims upon which suit is brought against them or reason of any alleged dishonesty on the part of the insureds, unless a judgment or other final adjudication thereof adverse to the insured shall establish the facts of active and deliberate dishonesty committed by the insureds with actual dishonest purpose and intent material to the cause of the action so adjudicated.

Throughout the course of this litigation, Crum & Forster's position has been that the policy did not afford coverage for Basin's claims, that there was no compensable loss, that the referenced exclusions operated to deny Basin any recovery of the monies which it refunded and the additional settlement payments nade by it, and that Basin would be unjustly enriched if allowed to collect the sums claimed from Crum & Forster.

C. Procedural History

This was an action for declaratory relief brought pursuant to 28 U.S.C. §2201.

The case actually began with Basin's filing of an involuntary Chapter 11 Bankruptcy Petition in March of 1984 against Midwest. Basin was the sole petitioning creditor named in that petition.

Midwest brought a Motion to Dismiss the Petition on the grounds of an insufficient number of petitioning creditors and, further, on the grounds that the Petition was filed in bad faith. The Bankruptcy Court denied that Motion.

Midwest appealed the decision of the Bankruptcy Court. The District Court reversed and the involuntary petition was dismissed when the District Court found the Petition had been filed in bad faith and was an attempt by Basin to improperly invoke the jurisdiction of the Bankruptcy Court to effect a contract dispute.

Basin then appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed the District Court. *Basin Electric Power Cooperative v. Midwest Processing Company*, 769 F.2d 483 (8th Cir. 1985), cert. denied 474 U.S. 1083 (1985). In the meantime, Basin had collected on the $5,000,000 Letter of Credit issued to Midwest by Continental.

Continental brought suit against Basin seeking reimbursement of the money it had paid to Basin as a result of the Bankruptcy filing along with interest. The suit also sought punitive damages.

The merits of that case were not litigated as, in June of

1987, Basin chose to settle. At the time, Basin provided a copy of its counsel's recommendation for settlement to Crum & Forster. By the terms of the settlement, Basin refunded the $5,000,000 to its rightful owners, Continental and Midwest, along with interest in the amount of $1,423,308. In addition, Basin paid $476,692 in settlement of claims for attorney's fees and punitive damages among other things.

This declaratory judgment action was started in October of 1987 following Basin's demand for reimbursement from Crum & Forster for all settlement payments, including the refund of principal and interest.

In July of 1988, Crum & Forster made a Motion for Summary Judgment which was denied. After taking additional depositions to complete the record, Crum & Forster moved for partial summary judgment with respect to Basin's claim for the amount of principal and interest; $6,423,000. The District Court granted the Motion for Partial Summary Judgment and, on its own motion, went on to dismiss the remainder of Crum & Forster's claims which amounted to approximately $477,000.

Basin appealed the Summary Judgment to the Eighth Circuit Court of Appeals raising the same issues and arguments recited in its Petition for Writ of Certiorari to this Court. The Eighth Circuit affirmed the District Court.

SUMMARY OF THE ARGUMENT

This is not an appropriate case for review upon Writ of Certiorari because (1) Basin had a fair and reasonable opportunity to present evidence and legal arguments relating to all issues in this case below, (2) the decision of the Court of

Appeals does not conflict with any decision of this Court, any Federal Court of Appeals or any state court of last resort and, in fact, is consistent with the decisions of both this Court and the Circuit Courts of Appeals, and (3) this case presents issues narrow in scope and of no national significance.

This Court and the various Circuit Courts have consistently held that a Court of Appeals may affirm the grant of a summary judgment on a theory different from the District Court when the particular circumstances require and when the record is sufficient to support the decision.

Basin had a full, fair and reasonable opportunity to present and develop its facts, arguments and legal positions below, In fact, Basin has already presented the lower courts with all of the evidence which it claims it will produce if given another chance and has previously presented the arguments which it now makes in support of its Petition.

ARGUMENT

A. THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS AFFIRMING SUMMARY JUDGMENT IN FAVOR OF CRUM & FORSTER DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL COURT OF APPEALS, OR ANY STATE COURT OF LAST RESORT AND, IN FACT, IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS.

Contrary to Basin's arguments, this Court and the various Circuits have consistently held that a Court of Appeals may affirm a summary judgment on a theory different from the District Court when the record is sufficient to support the Judgment.

Basin relies upon three decisions rendered by this Court in support of its Petition for Writ of Certiorari. Interestingly, each case provides support for a denial of its Petition for Writ of Certiorari.

Perhaps the most instructive is the case of *Hormel v. Helvering*, 312 U.S. 552 (1940). In *Hormel*, this Court rejected the arguments now advanced by Basin: That an appellate court may never pass on issues not addressed by the court below.

What distinguishes *Hormel*, and other cases relied upon by Basin, is that Basin did have a full, fair and reasonable opportunity to present and develop its facts, arguments and legal support for its stance in this case.

Application of the principals discussed in *Hormel* should result in denial of Basin's Petition. In its Petition, Basin cited only to a portion of this Court's explanation of the principal of law involved here. What Basin did not recite is the comments which begin at page 556 where this Court stated:

> "But those cases do not announce an inflexible practice as indeed they could not without doing violence to the statutes which give to the Circuit Courts of Appeals reviewing decisions of the Board of Tax Appeals the

> power to modify, reverse or remand decisions not in accordance with law as justice may require. There may always be exceptional cases or particular circumstances which will promote a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the Court or administrative agency below." *Id.* at 556 to 557 citing *Blair v. Oesterlein Machine Co.*, 275 U.S. 220, 225.

And the Court further explained that:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with that policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Id.* at 557.

And as further explanation, this Court referenced various cases cited by the Appellant in *Hormel* noting:

> "These decisions and others like them while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied when the obvious result would be a plain miscarriage of justice." *Id.* at 558.

In closing, the *Hormel* Court held "therefore to apply here the general principal of appellate practice for which Petitioner contends would result in permitting him to wholly escape payment of a tax which under the record before us he clearly owes. Thus viewed, this is exactly the type of case where application of the general practice would defeat rather than promote the ends of justice, and the Court below was right in its holding." *Id.* at 560.

Accepting Basin's contention and blindly applying a general proposition of law to this case would defeat, rather than promote, the ends of justice.

Basin next turns to the case of *Singleton v. Wulff*, 428 U.S. 106, (1975), an abortion case. In addressing an unrelated rule of law, the *Singleton* Court made a statement which is of particular significance when it stated that Courts should not slavishly follow "general rules." The *Singleton* Court emphasized, "like any general rule, however, this one should not be applied where its underlying justifications are absent." *Id.* at 114. Although the *Singleton* Court reversed to allow the

Appellant to present evidence, the case is so factually distinct from the one at bar as to render it unpersuasive. In *Singleton*, the Appellant filed only a pre-Answer Motion to Dismiss. No Answer was ever filed and no other pleading addressed the merits of the case. The only exchange of information which occurred between the parties were answers to certain Interrogatories. The Court found it significant that the Appellant "...had never been heard in any way on the merits of the case..." *Id.* at 150.

Nothing could be further from the facts in this case. Basin filed its Answer, a Counterclaim and Crum & Forster served a Reply to the Counterclaim. Numerous Interrogatories were served by Basin on Crum & Forster and by Crum & Forster on Basin. Motions to Compel Discovery were made and heard and Orders were issued. Thirteen depositions were taken and an initial Motion for Summary Judgment was made in April, 1988. Basin filed two responsive Briefs to that Motion alone. The Motion was denied. More depositions were taken to complete the factual record. A Motion for Partial Summary Judgment was reurged by Crum & Forster. The facts allegedly giving rise to Basin's claims were exhaustively detailed in the Briefs. A hearing was held and Summary Judgment was granted.

Basin appealed to the Eighth Circuit Court of Appeals. It again briefed and argued the issues of coverage, exclusions, discovery disputes, its conduct, and what it expected to prove if it could obtain a reversal. The facts upon which Basin alleged that its claims were based were once again precisely detailed in the Briefs. Basin specified facts it intended to prove should the summary judgment be reversed. Those are the same arguments it makes here. The Court of Appeals was not persuaded.

Now Basin seeks certiorari from the highest Court of our land claiming that a narrow issue of insurance coverage raises an issue of national importance, warranting this Court's consideration. It is simply not so.

Basin provides this Court with string cites to cases allegedly supporting its positions. Several warrant comment. Basin cites the case of *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2nd Cir. 1977). *British Airways Board* dealt with a case where the defendant below had attempted to raise a factual issue for the first time on appeal; not a legal argument.

Although relied upon by Basin, the case of *Rich v. United States Lines, Inc.*, 596 F.2d 541 (3rd Cir. 1979) clearly supports the position advanced Crum & Forster throughout this lengthy and expensive litigation. It firmly held "an appeals court may affirm the grant of a summary judgment on a theory different from that of the District Court when the parties have presented all available evidence." *Id.* at 551.

In this case, we have the advantage that Basin has outlined in its Petition, each and every fact it claims it would prove if given yet another opportunity to present evidence and argument. As will be shown in Section B of this Brief, Basin has already had the opportunity to present evidence and argument on all of those points to the District Court on two occasions and the Eighth Circuit on two occasions.

Proctor v. State Farm Mutual Automobile Insurance Company, 675 F.2d 308 (D.C. Cir. 1982) is cited by Basin in support of its request to be given yet another opportunity to rehash the issues of its conduct, the coverage, and the exclusions. In *Proctor*, the Court of Appeals, discussing *Singleton*, supra, stated:

> "Nonetheless, as the Court made clear, [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the Court of Appeals, to be exercised on the facts of individual cases. *Id.* at 121, 96 S.C. at 2877. *Singleton* announced no general rule, because the Court recognized that certainly there are circumstances in which a Federal Appellate Court is justified in resolving an issue not passed on below..." *Id.* at 326.

In the instant case, Basin not only had a fair opportunity to dispute Crum & Forster's claim that it had no obligation under the policy to pay Basin's claims, Basin made the issues of coverage, its conduct, exclusions and discovery disputes major parts of its presentation to both the District Court and the Eighth Circuit Court of Appeals.

Several other comments made by Basin are noteworthy. Basin does point out to the Court that it made a Motion to Supplement the Record to the Eighth Circuit at the time of appeal. Although Basin is correct when it states the Eighth Circuit did not rule on the Motion, it does not logically follow nor can we assume the Eighth Circuit did not review the "evidence" brought before it by Basin in its Motion to Supplement the Record.

Basin correctly anticipates Crum & Forster will assert Basin was not treated unfairly. By its very comment, Basin implies a recognition that it was, indeed, treated fairly. Basin suggests that it was restricted to "naked legal arguments." That is simply not true. Basin exhaustively and extensively presented facts regarding its conduct, the coverage, discovery disputes, and all exclusions under the policy. Basin merely wants another chance to argue the same issues to a different Court. It has tried and failed on all levels properly available. The arguments it now presents are the same as it has presented throughout this litigation.

In the underlying action Basin had numerous opportunities to present its evidence, arguments, and legal support in the Bankruptcy Court, in the District Court, in the Burleigh County State Court of North Dakota, in the Eighth Circuit Court of Appeals, and before this Court when it brought its Petition for Writ of Certiorari. In the present case, Basin has also tried and failed on all levels properly available to it. Basin was twice before the District Court presenting issues regarding its conduct, the coverage, discovery disputes and the exclusions and twice before the Eighth Circuit Court of Appeals on ititial appeal and on Petition for Rehearing.

After all this, Basin is still attempting to argue issues it has already presented, argued and briefed.

B. BASIN ELECTRIC HAS HAD A FULL, FAIR AND REASONABLE OPPORTUNITY TO PRESENT EVIDENCE, ARGUMENT AND LEGAL SUPPORT RELATING TO THE ISSUE OF COVERAGE IN THIS CASE.

Basin claims it should have another opportunity to prove coverage existed in this case and goes so far as to disclose how it will prove its claim if allowed. Central to Basin's argument is its assertion that it did not have the opportunity to present and develop these facts and arguments in the Courts below. Any such assertion is incorrect. Basin raised, developed, briefed and argued all five points it now raises in both the District Court and the Eighth Circuit Court of Appeals. The same arguments were made in its Briefs below.

First, Basin claims it will prove that the conduct of its employees and officers falls within the scope of coverage under Crum & Forster's policy. Basin has had full opportunity and did present the factual evidence regarding its officers' conduct which resulted in its receipt and refund of the $5,000,000. Depositions of the key employees were taken and the evidence was available to Basin in its arguments to the courts below. Nothing new is available to Basin. Evidence of the conduct of the parties has been presented below and any inference otherwise is correct.

Second, Basin claims it would prove coverage existed because it would show a "course of dealing" between Crum & Forster and Basin Electric. Again, Basin asserted the same argument in its Brief to the Eighth Circuit Court of Appeals. In its "course of dealing" argument, Basin attempts to bootstrap two employment cases to the coverage issue in this case. Basin has raised these very same arguments below and the Eighth Circuit rejected them. Also, it is noteworthy that the two employment cases cited did not even address an issue of coverage.

Third, Basin claims it will prove waiver on Crum & Forster's part as to any issue relating to coverage. This is at least Basin's fourth run at this issue. It was asserted,

developed, briefed and argued at all stages of the proceeding in the District Court as well as the Eighth Circuit Court of Appeals. Neither Court below was persuaded.

Fourth, Basin claims if given a chance, it will show that case law establishes coverage. This is again the fourth time Basin has made the argument relying upon the same case. Basin has so argued since June 3, 1988, when it filed its first Brief in opposition to the initial Summary Judgment Motion by Crum & Forster. The argument has been consistently rejected by the Courts below.

Fifth, Basin claims if given a chance, a discovery dispute will somehow magically transform this case into one in which no coverage exists to one where coverage does exist. Again, Basin has developed, briefed and argued the discovery issues initially on June 3, 1988, and in each and every Brief it has written thereafter. Neither of the Courts below have been persuaded.

Basin's attempts to convince this Court it has not had a full, fair and reasonable opportunity to present evidence and legal argument on each and every claim it makes for coverage cannot be sustained. A simple review of Basin's Briefs below reveals that it has already presented its "evidence" and legal arguments to the Courts below, which found them unpersuasive.

C. THIS CASE PRESENTS A NARROW ISSUE IN SCOPE AND ONE OF NO NATIONAL SIGNIFICANCE.

This case deals with the narrow issue of whether a particularized insurance policy designed for non-profit organizations provides coverage to an insured under specific facts. It does not by any stretch of the imagination involve a case of national magnitude.

Finally, at the close of Basin's Petition for Writ of Certiorari, it attempts to convince this Court that the Circuits are split on the issue involved. That is not the case. There is no justification for a grant of certiorari in this case and Basin's self invented conflict between the Circuits is without foundation.

The Circuit Courts have consistently followed the rule recited in *Hormel v. Helvering*, 313 U.S. 552 (1940) wherein this Court held that an Appellate Court may consider questions not pressed nor passed on below when the particualr circumstance and justice requires. *Id.* at 557. The Circuit Courts have also uniformly followed the rule recited in *Riley v. Commissioner of Internal Revenue*, 311 U.S. 55 (1940) wherein this Court held that where a decision below is correct "it must be affirmed by the Appellate Court though the lower court gave a wrong reason for its action." *Id.* at 59.

While the language adopted by each Circuit may not be precisely the same, the effect is. Despite Basin's attempts to convince this Court otherwise, the rule of law is consistent throughout the Circuits and in fact is consistent with the law set forth by the Supreme Court.

In *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990) a summary judgment for the employer in an employment discrimination suit was affirmed with the Court noting that "...In reviewing summary judgments as elsewhere, a Court of Appeals is not limited to the District Court's reasoning, but may affirm on any independently sufficient ground." *Id.* at 7.

Alfaro Motors, Inc. v. Ward, 814 F.2d 883 (2nd Cir. 1987) affirmed a summary judgment for the Defendant with the Court noting, "Although the District Court based its dismissal of the Complaint on other grounds, we are free to

affirm a District Court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the District Court." *Id.* at 887.

In *Johnson v. Orr*, 776 F.2d 75 (3rd Cir. 1985), the Court of Appeals affirmed a summary judgment for the plaintiff, but for different reasons than those enunciated by the District Court. The Court of Appeals noted, at footnote #7, page 83 that an Appellate Court may affirm a result reached by the District Court on reasons that differ so long as the record supports the judgment.

Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440 (5th Cir. 1990) affirmed a summary judgment for the defendant manufacturer in a products liability case with the Court noting that it may affirm a grant of summary judgment on grounds other than those stated by the trial court. *Id.* at 444.

Brown v. Southwestern Bell Telephone Co., 901 F.2d 1250 (5th Cir. 1990) affirmed a summary judgment in favor of the plaintiff with the Court noting that it may affirm a summary judgment on grounds other than those relied upon by the District Court when the Court finds in the record an adequate and independent basis for that result. *Id.* at 1255.

Russ-Kwik Car Wash, Inc. v. Marathon Petroleum Co., 772 F.2d 214 (6th Cir. 1985) affirmed a summary judgment in favor of the defendant with the Court noting, "A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court. Citing *J.E. Riley Investment Co. v. Commissioner*, 311 U.S. 55 (1940).

Sally Beauty Co., Inc. v. Nexxus Products Co., Inc., 801 F.2d 1001 (7th Cir. 1986) wherein the Court affirmed a summary judgment for the defendant manufacturer noting, "We may

affirm this summary judgment, however, on a different ground if it finds support in the record." *Id.* at 1005.

Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990) affirmed the dismissal of the plaintiff's claims noting that a judgment may be affirmed on any grounds supported by the record even if not relied upon by the District Court.

Stoetzel v. Continental Textile Corporation of America, 768 F.2d 217 (8th Cir. 1985) a summary judgment for an employer was affirmed with the Court noting that it may affirm on any grounds supported by the record even though that ground was not directly addressed (or addressed at all) in the court below." *Id.* at 222.

Catter v. Arkansas Louisiana Gas Co., 765 F.2d 730 (8th Cir. 1985) affirmed a dismissal of a Complaint noting that an Appellate Court may affirm on any grounds supported by the record, even though the ground was not directly addressed, or, in fact addressed at all in the court below. *Id.* at 735.

Fidelty Financial Corp. v. Federal Home Loan Bank of San Francisco, 792 F.2d 1432 (9th Cir. 1986) affirmed the dismissal of a Complaint noting that the Appellate Court may affirm a District Court on a ground not selected by the district judge so long as the record fairly supports an alternative disposition on the issue. *Id.* at 1437.

This Court has denied Petitions for Certiorari in cases involving the issue raised by Petitioner:

Chongris v. Board of Appeals, 811 F.2d 36 (1st Cir. 1987), cert. denied 483 U.S. 1021 (1987); *Railroad Labor Executives Association v. Stanton Island Railroad*, 792 F.2d 7 (2nd Cir. 1986) cert. denied 479 U.S. 1054 (1987); *Brown v. St. Louis*

Police Department, 691 F.2d 393 (8th Cir. 1982) cert. denied 461 U.S. 908 (1983); *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 880 (10th Cir. 1984) cert. denied 476 U.S. 1182 (1986); *Lindsey v. Dayton Hudson Corporation*, 592 F.2d 1118, 1124 cert. denied 444 U.S. 856 (1979).

Basin boldly states that it was deprived of its day in court. The facts are to the contrary. Basin is seeking yet another chance to present the same facts, the same law and the same arguments it has since October of 1987 when this action commenced. It continues to consume the judicial system in an attempt to recoup the reimbursement it made of monies to which it was not rightly entitled.

CONCLUSION

The record unequivocally establishes that Basin was allowed a fair, full, meaningful and reasonable opportunity to present evidence, argument and legal support regarding the issues deemed dispositive by the Eighth Circuit. Basin cannot claim surprise when a plain reading of its Petition for Writ of Certiorari reveals each and every issue, argument and legal authority presented therein is identical to those presented to the Eighth Circuit Court of Appeals in its prior Briefs.

Dated this 18th day of January, 1991.

Respectfully submitted,

Jay Fiedler
LETNES, MARSHALL, FIEDLER & CLAPP, LTD.
401 DeMers Ave., Suite 202, P.O. Box 1950
Grand Forks, ND 58206-1950
(701) 772-3407

Attorneys for Respondent, Crum & Forster Managers Corporation of New York d/b/a International Insurance Company

STATEMENT REQUIRED BY RULE 29.1

Crum & Forster Managers Corporation of New York d/b/a International Insurance Company has the following parent corporations: Xerox, Xerox Financial Corporation, and Crum & Forster Commercial Insurance. Crum & Forster Managers Corporation of New York d/b/a International Insurance Company has no subsidiaries which are not wholly owned.